United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,973

ROBERT L. JONES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the Appellant, the following questions are presented:

1. Whether a conviction for the sale, purchase and possession of narcotics is valid under the federal statutes where the evidence shows that the amount of the narcotics in question is very minute and where the evidence lacks proof of quantitative sufficiency of the substance for use as a narcotic.

2. Whether the trial judge commits reversible error when, on his own motion, without any interrogation by court or counsel, he excuses, sua sponte, an informant who is called and sworn as a witness for the defendant but who does not claim a privilege against self incrimination and does not inform the judge of any fact in his prospective testimony which could or might implicate him and create the danger of his conviction for crime, and who could not on the record validly claim the privilege against self incrimination.

3. Whether the constitutional rights of a defendant charged with violations of the federal narcotics laws are violated by a delay of (a) four and one-half months from the date of the first alleged sale and the issuance of a complaint and an arrest warrant and (b) a delay of one year from the sale to the trial, where, apart from the narcotics, the prosecution's case consists

solely of an undercover agent's testimony that he had purchased narcotics from the defendant, and where, during the trial one year after this alleged sale, neither the defendant nor the informant can remember what happened on the date in question.

4. Whether the trial judge errs in refusing to instruct the jury on the defense of entrapment where the evidence lacks proof of the defendant's predisposition to sell narcotics and the informer sees the defendant standing alone on a sidewalk, and, in the presence of the undercover agent, calls him to his car and asks him whether he has narcotics to sell and thereafter a sale between the defendant and the agent is consummated.

5. Whether the defendant charged with and tried for federal narcotics violations received effective assistance of counsel before, during and after the trial in the context of the circumstances in the record before the court.

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TABLE OF AUTHORITIES

* Cases and authorities chiefly relied upon are marked by an asterisk.

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JURISDICTIONAL STATEMENT

The appellant was indicted for violations of the Federal narcotics laws. A trial resulted in the conviction of the appellant on charges of the sale, possession, and facilitation of concealment and sale of narcotic drugs, knowing them to have been imported contrary to law. Subsequent to the sentence on March 17, 1967, the appellant filed an application for

allowance, in forma pauperis, to appeal to this Court. The District Court granted the application on April 24, 1967. The jurisdiction of this Court is asserted under 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

Preliminary statement - The appellant was indicted in eight counts for the crimes of selling, possessing, and facilitating the concealment and sale of narcotic drugs, knowing them to have been imported contrary to law and in violation of 26 U.S.C. 4705 (a), 4704 (a) and 21 U.S.C. 174. He was tried and convicted on each of the eight counts. The testimony and proceedings were as follows:

The case relates to two alleged sales by the appellant on February 7, 1966 and April 6, 1966, respectively, and possession on June 28, 1966. The appellant denied each alleged sale but admitted only possession of several capsules containing heroin on June 28, 1966 when he was arrested and nothing else. The defense to the February 7, 1966 and April 6, 1966 charges of sales of a narcotic drug containing heroin was that of mistaken identification.

The February 7, 1966 incident - Joseph Mordecai

testified that he purchased narcotics from the appellant on February 7, 1966 under the following circumstances. On that day he was and had been an undercover agent with the Narcotics Bureau of the Treasury Department for about nineteen months. (Tr. 22) On February 7, 1966 he was a passanger in a car owned and driven by an informant for the Narcotics Bureau. (Tr. 23, 176) Mordecai's purpose was to assume the role of a user of narcotics and to make purchases from suspected sellers (Tr. 22). Mordecai and the informant were proceeding in a southerly direction on 14th Street in Northwest Washington and, as they entered the 1900 block, the informant saw the appellant standing on the sidewalk in that block and called Mordecai's attention to the presence of the appellant there and pointed to him. (Tr. 23-24) Mordecai at that time did not know the appellant and had never talked with him, although he had seen him previously in the area. (Tr. 24)

The informant stopped the car at the curb in front of the building where the appellant was standing and called him to the car. (Tr. 24)

The appellant approached and entered the car, and sat in a rear seat. (Tr. 24) The informant then

inquired of the appellant whether he had any narcotics to sell, and the appellant answered in the affirmative. (Tr. 25) As a result of this conversation, the appellant sold Mordecai two envelopes containing a white powder for $20. (Tr. 26) Mordecai did not disclose the identity of the informant or divulge any information about him. The appellant categorically denied the truth of Mordecai's testimony. (tr. 174) Mordecai further testified in effect that he did not give the appellant a written order for the Treasury Department for these envelopes and that there were no tax stamps affixed to these envelopes. (Tr. 28-29)

John Steele, an analytical chemist specializing in analyses of narcotics and dangerous drugs for the Internal Revenue Service, testified that he made an analysis of the contents of the two glassine envelopes Mordecai purchased from the appellant. (Tr. 152 - 154) Before the analysis the white powder in the two envelopes weighed 500 milligrams and after the analysis it weighed 400 milligrams. (Tr. 154) A computation of Steele's figures shows that a milligram is 1/28375 of an ounce. (Tr. 160) Steele found the powder to contain heroin hydrochloride, which he said is a derivative of opium

and a narcotic drug, and, in addition, the powder contained quinine hydrochloride and mannitol, (Tr. 154) neither of which is a derivative of opium nor a narcotic drug. These last two substances were mixed with the heroin hydrochloride to dilute it. (Tr. 155) Steele further testified that his analysis was only qualitative and not quantitative, having only identified the substances in the mixture, and he therefore did not try to ascertain what percentage of the contents of the two envelopes in question was heroin hydrochloride, quinine hydrochloride and mannitol, respectivly, and he did not ascertain the amount of heroin hydrochloride. (Tr. 161 - 165, 169)

The April 6, 1966 Incident - Mordecai testified that on April 6, 1966 he made a second purchase of narcotics from the appellant under the following circumstances. On that day, while he was driving a car, he observed the appellant leaving a pool room in the 1900 block of 14th Street, Northwest, in Washington. Another informant was Mordecai's passenger. Mordecai stopped and parked the car in front of the pool room and this second informant asked the appellant whether he was selling narcotics. (Tr. 30-31) The appellant answered in the affirmative

and accepted Mordecai's invitation to enter the car. (Tr. 31) Mordecai asked the appellant for the price of an envelope and the appellant told him the price was $12. The appellant then agreed to sell the undercover agent three envelopes for $35. Mordecai thereupon handed the appellant this amount of money and the latter gave the former three glassine envelopes containing a white powder. (Tr. 31-32, 36-37, 43, 45-47) Mordecai also testified that he did not observe any tax stamps on the envelopes involved in the April 6, 1966 transaction and that he did not give the appellant a written order form for the Treasury Department for the envelopes he received from the appellant. (Tr. 39) Mordecai refrained from both disclosing the identity of the second informant and divulging any information about this person. The appellant denied ever having sold narcotics and ever having seen Mordecai until June 28, 1966. (Tr. 174-175, 193) Undercover Agent Samuel Reed, however, testified that on April 6, 1966 he saw the appellant enter the car driven by Mordecai at the time and place specified in Mordecai's testimony. (Tr. 55)

Steele, the Government's chemist specializing in narcotic drugs, also analyzed the contents of the three envelopes which were the subject matter of the April 6, 1966 story related by Mordecai. (Tr. 155) Before his analysis Steele found the envelopes to contain 240 milligrams of heroin hydrochloride, quinine hydrochloride and mannitol and 220 milligrams thereafter. (Tr. 156) Testifying in relation to 320 milligrams of the powder, he said that 320 milligrams is a "very minute amount of material." (Tr. 161) Steele's procedure in relation to the trhee envelopes involved in the April 6, 1966 episode was precisely that used with reference to the two envelopes which Mordecai said he bought on February 7, 1966. Hence his analysis did not determine the amounts, respectively, of heroin hydrochloride, quinine hydrochloride and mannitol in the three April 6, 1966 envelopes. (Tr. 164, 169)

The June 28, 1966 incident - The appellant was arrested on June 28, 1966 at the intersection of 14th and U Streets, N.W. in Washington by Robert M. Stutman, a Federal Narcotics Agent, pursuant to an arrest warrant. (Tr. 62, 177) Stutman searched the appellant at this location and found on his person

a cigarette package which contained eighteen capsules (Tr. 64-65, 177) The following day he delivered these capsules to Steele, the narcotcs chemist heretofore identified. (Tr. 65)

Steele examined the contents of these eighteen capsules, which contained a white powder. (Tr. 157) Three did not contain any narcotics. The remaining fifteen capsules weighed 320 milligrams of a mixture of heroin hydrochloride, mannitol and milk sugar before analysis and 260 milligrams thereafter. (Tr. 157-161) As in the analyses Steel made pertaiming to the February 7,1966 and April 6, 1966 indidents his analysis was only qualitative and not Quantitative and he did not ascertain the amount of heroin hydrochloride in the eighteen capsules taken from the appellant on June 28, 1966. (Tr. 161-165, 169) As stated above, Steele testified that 320 milligrams of a substance is a very minute amount thereof. (Tr. 161)

The two informants involved in this case - The sales of narcotics on February 7, 1966 and April 6, 1966, which the appellant denied making, involved two informants, as shown above. They were husband and wife and the prosecutor supplied the

appellant's attorney with their names before the testimony ended. (Tr. 41-46, 67, 184, 195) The record is silent as to whether the appellant desired or tried to have the wife informant testify as to the April 6, 1966 incident. During the trial on January 31 and February 1, 1967, the appellant did produce the husband informant, John Williams, and sought his testimony as to the details of the first alleged sale by the appellant to the undercover agent on February 7, 1966. At a bench conference the trial judge observed that he should advise Williams as to his right to remain silent since Williams was then in jail and should know of and understand "his right to remain silent." (Tr. 190) The record is totally silent as to how and to what extent, if any, Williams' testimony relating to the alleged sale on February 7, 1966, at which he was present, could in any manner and to any degree have incriminated him. Following this bench conference the court excused the jury and told Williams that the appellant had called him as a witness, that he was not required to make any statement, and that any statement he made could and might be used against him, and that he could refrain from testifying. (Tr. 192-196) Counsel thereupon informed the court

that the appellant's purpose in having Williams testify was to elicit evidence, in effect, relating to the sale of narcotics by the appellant, his mistaken identity, and possible entrapment. (Tr. 193) Williams elected to remain silent but did say that he did not think that he could remember what happened on February 7, 1966. (Tr. 195) The court thereupon excused Williams and he left the courtroom. (Tr. 196) The entire colloquy involving this episode is contained on pages 189-196 of the transcript and is reproduced in full, infra, as Appendix B.

The time lapse from first sale to arrest and trial. - In addition to Williams' inability to remember on February 1, 1967 the details of an alleged sale by the appellant on February 7, 1966, the appellant himself testified on February 1, 1967 that he could not remember where he was on February 7, 1966 and on April 6, 1966. He admitted that both he and Williams were users of narcotics and that he knew Williams in this connection. (Tr. 175-176)

STATUTES INVOLVED

The applicable statutes are set forth in Appendix A, pages 1a - 3a, infra.

STATEMENT OF POINTS

1. The narcotics conviction of appellant was based only on a qualitative analysis of the evidence which lacked essential proof of quantitative sufficiency of its usability as a narcotic, as required by the applicable statutes.

2. The District Court erred when, without any interrogation by Court or Counsel, an informant who was called and sworn as a witness for the appellant but who did not claim any privilege and did not inform the court of any fact in his prospective testimony which could or might implicate him and create the danger of his conviction for crime.

3. The appellant's rights guaranteed by the Bill of Rights were violated by (a) the delay of four and one-half months from the date of the first alleged sale of narcotics and the issuance of the complaint and (b) the delay of one year from the sale to the trial, where, apart from the narcotics, the prosecution's case consisted solely of an undercover agent's uncorroborated testimony that he had purchased narcotics

from the appellant, and where, during the trial one year after this alleged sale, neither the appellant nor the informant could remember what happened on the date in question.

4. The District Court erred in refusing the appellant's request to instruct on the defense of entrapment.

5. The appellant did not receive adequate effective assistance of counsel before, during and after the trial.

SUMMARY OF ARGUMENT

A. Insufficiency of Heroin Content

The appellant was convicted of narcotics violations by evidence of two sales and a possession of a quantity of white powder. In each case, the white powder was a mixture of heroin hydrochloride, a narcotic derivative of opium, and two other substances of which neither contained any narcotic. The Government chemist who analyzed the white powder received in evidence testified that he made only a qualitative analysis and that he therefore did not determine and did not know the quantity of heroin hydrochloride in each portion of the substances received in evidence. Moreover, he did not ascertain and hence could not say what percentage of the

whole of the mixtures involved in the sales on February 7, 1966 and April 6, 1966, respectively, and in the possession on June 28, 1966 consisted of heroin hydrochloride and each of the non-narcotic substances.

The Chemist did describe each of two of the three portions of white powder as containing a "very minute amount of material" and in context the third portion also comprised a very minute quantity of substance. The net result of the chemical analyses was a finding that each portion of the three substances was of a very minute amount.

The offenses involving narcotics imply that in order to convict the defendant must sell or possess something of substance and that substance must be in such quantity and quality to be usable as a narcotic. Absent each of these essentials a conviction cannot stand. Since the amount of narcotics received in evidence in relation to each alleged offense is very minute and there is an absence of evidence showing that these narcotics were capable of the use commonly made thereof, this Court should reverse the conviction herein.

B. Improper Exercise of Privilege Against Self-Incrimination

The trial judge, sua sponte, excused an alleged

informant called and sworn as a witness for the appellant. The defense informed the court that it expected to prove mistaken identity, entrapment and other matters in issue. The court, on its own motion, advised the informant that he had the privilege of either testifying or refraining from testifying and that anything he said as a witness in this case might and could be used against him in any proceeding brought against him by the Government. This statement by the court and the court's order excusing the informant as a witness without giving testimony but after electing to refrain from testifying constituted reversible error. The informant did not claim the privilege against self-incrimination and did not state any facts upon which it could be based. Moreover, the informant could not assert the privilege since all he did in relation to the alleged February 7, 1967 sale was to call the appellant to his car and ask him whether he had narcotics for sale. This conduct did not amount to either a sale or purchase and hence did not violate the narcotics laws. His testimony involving this alleged sale could not incriminate him and even if he had claimed the privilege he could not sustain it. The net result was to deprive the appellant of evidence which might have offset that introduced by the prosecution and in this way might have weighed the balance in his favor.

C. Prejudicial Delay of Arrest and Trial Following Alleged Offense

The arrest of the appellant occurred four and one-half months after the alleged sale on February 6, 1966. The trial was held one year after the sale. The appellant and the informant each testified that he could not remember what happened on February 7, 1966, one year earlier. The appellant was convicted on the uncorroborated testimony of the undercover agent and the narcotics evidence. This lack of reassuring corroboration and unexplained delay of the events of the arrest and the trial constituted an undue and prejudicial subordination of the appellant's interests. These delays violated the appellant's substantial rights as indicated above and require the reversal of the convictions herein.

D. Erroneous Foreclosure of Entrapment Defense

The record in this case warrants the inference that the alleged sale on February 7, 1966, if indeed it did occur, was initiated by the undercover agent, that it was the product of his design, and that the appellant did not have a previous disposition to commit the offense. If the informant had not parked his car where the appellant was standing, and had not called him to the car, and had not asked him whether he had narcotics to sell, the sale

would not have been made. The defense of entrapment may be raised by a plea of not guilty and there was a prima facie showing of entrapment. The trial judge should have granted the appellant's motion for a judgment of acquittal on the ground of entrapment. Instead, he denied the motion "as untimely" and because, in addition, there was "no evidence of entrapment in this case." (Tr. 225) These findings of fact and denial of the motion amounted to prejudicial error.

E. Lack of Effective Assistance of Counsel

The appellant was represented by an attorney appointed five and one-half months before the trial. The record indicates a relatively lethargic and unresourceful performance by this attorney. A study of the record strongly suggests that there should have been ample and intelligent (a) use of various motions for discovery before trial, (b) cross-examination of the uncorroborated under-cover agent in relation to identification, (c) logical jury argument on all points of defense, (d) request for jury instructions on matters of identification, entrapment and minute amounts of opiate ingredients in the substances sold and possessed, as charged in the indictment, and (e) appropriate post-trial motions. According to the original record and transcript filed in this Court, the counsel for appellant failed to render these professional services.

ARGUMENT

A. THE NARCOTICS CONVICTION OF APPELLANT WAS BASED ONLY ON A QUALITATIVE ANALYSIS OF THE EVIDENCE WHICH LACKED ESSENTIAL PROOF OF QUANTITATIVE SUFFICIENCY OF ITS USABILITY AS A NARCOTIC, AS REQUIRED BY THE APPLICABLE STATUTES.

The appellant was convicted of the sale, possession and facilitation of concealment and sale of narcotic drugs. The Government chemist who testified in this case stated that with respect to the February 7, 1966, April 6, 1966 and June 28, 1966 episodes involved in the trial, he made only qualitative and not quantitative analyses of the substances. In each instance he made a qualitative test and found heroin hydrochloride and two other substances but he did not determine the quantity of any component. He said that heroin hydrochloride is a narcotic drug derived from opium but that neither of the other two substances he found in the mixture is either a derivative of opium or a narcotic drug. The chemist did not attempt to determine the quantity of heroin hydrochloride in any of the three mixtures of substances he examined in connection with this case and he did not know what percentage of the contents of the envelopes and capsules received in evidence to convict the appellant consisted, respectively, of heroin hydrochloride and the non-opiate, non-narcotic substances which comprised the mixtures in the three incidents alleged in the indictment.

The alleged February 7, 1966 sale by the appellant to the undercover agent involved 500 milligrams of a mixture of three substances, the alleged April 6, 1966 sale involved 240 milligrams, and the alleged June 28, 1966 possession of fifteen capsules involved 320 milligrams. The Government chemist testified that a milligram is 1/28,375 of an ounce and that 320 milligrams of a substance is a "very minute amount of material."

It follows that even if 100% of the substance involved in each episode charged in the indictment was pure heroin hydrochloride the amount would still be very minute. The problem is further compounded by the absence of evidence as to what were the percentages of heroin hydrochloride, and of the other substances, respectively, in the mixtures which the chemist analyzed.

Appellant's counsel is not aware of any adjudication by this Court of the so-called question of mere traces of an opiate narcotic. In Briscoe v. United States, 119 U.S. App. D.C. 41, 336 F.2d 960 (1964) the appellant contended that there was an insufficient amount of material to permit of quantitative chemical analysis and thus there was failure of adequate proof of the exact amount of heroin in the bags sold by the appellant. In its Per Curiam opinion this Court refrained from deciding the issue because it had not been properly

raised at the trial.

Appellant's contention, however, has ample judicial support. Among the authorities are United States v. Glover, D.C. Gen. Sess. Nos. U.S. 9431-65, 9432-65, January 24, 1966; Edelin v. United States, 227 A.2d 395 (D.C. App., March 20, 1967); and Marshall v. United States, 229 A.2d 449 (D.C. App. D.C. April 28, 1967). In Glover the defendant argued that the evidence produced by the Government showed that if he did have possession of heroin, then the quantity was so minute that he could not have committed a criminal offense. In granting the defendant's motion for a judgment of acquittal, Judge Halleck in part said:

> The crime of possession of an illicit narcotic drug carries with it the necessary implication that in order to be convicted the defendant must possess something of substance. ... In order that this defendant may be convicted of unlawful possession of a narcotic drug, to wit: heroin, the evidence must show: One, the person charged must have been in possession of a substance; Two, the substance must have been a narcotic drug; Three, the substance must have been in such quantity and quality to be susceptible of use as a narcotic; Four, the possessor must have knowledge of the possession of such substance....

In Edelin the appellant argued that the amount of heroin was insufficient to show illegal

possession of a narcotic drug under the statute. He reasoned (a) that where the amount is microscopic or infinitesimal and in fact unusable as a narcotic, the possibility of unlawful sale or use does not exist and (b) that proscription of possession under these circumstances is inconsistent with the rationale of the statutory scheme of narcotics control. The statute should therefore be interpreted as requiring proof of possession of at least a usable quantity of narcotics. The District of Columbia Court of Appeals agreed with the appellant and held that:

> where there is only a trace of a substance, a chemical constituent not quantitatively determined because of minuteness, and there is no additional proof of its usability as a narcotic, there can be no conviction under Sec. 33-402(a)

The same court reached the same result in Marshall, saying in part:

> We do not remand for new trial as there is no showing that the government has additional proof that the actual amounts involved were more than mere traces which were actually usable or salable as narcotics.
>
> Greer v. State, 163 Tex. Crim. 377, 292 S.W.2d 122 (1956) is persuasive on the point. Chemical analysis indicated a trace of heroin. The court found this an insufficient quantity to authorize conviction. A year

later the court reaffirmed the Greer decision in Pelham v. State, 164 Tex. Crim. 226, 298 S.W.2d 171 (1957). In reversing a conviction for illegal possession of marijuana, the court concluded that:

> the reasonable construction and interpretation to be applied here is that the legislature intended that to constitute the unlawful act of possessing marijuana there must be possessed an amount sufficient to be applied to the use commonly made thereof. (298 S.W.2d at 173)

Courts in Arizona and California are also in agreement. State v. Moreno, 92 Ariz. 116, 374 P.2d 872 (1962 en banc) is an interesting application of the usability-test doctrine. There heroin residue was found on four wads of cotton. These could be processed to furnish enough narcotics for a "booster shot" when larger amounts of heroin were unobtainable. Although weak, the injection was enough to tide the defendant over for a period. The court said:

> We believe the correct rule to be applied under a statute such as ours is that where the amount of a narcotic is so small as to require a chemical analysis to detect its presence, the quantity is sufficient if usable under the known practices of narcotic addicts. We hold that only in those cases where the amount is incapable of being put to any effective use will the evidence be insufficient to support a conviction. (376 P.2d at 875)

Cf. People v. Leal, 50 Cal. Rptr. 777, 413 P.2d 665, 670 (1966 en banc) where the court said that "the possession of a minute crystalline residue of narcotic useless for either sale or consumption ··· does not constitute sufficient evidence in itself to sustain conviction."

Appellant submits that the usability test, as expounded and applied in the cases discussed above, operates with like and equal force in the instant appeal. Although the appellant was a user, three of the eighteen capsules he bought on June 28, 1966 did not contain an opiate narcotic. And the record is devoid of evidence as to the amount of heroin hydrochloride present in the three amounts of white powder involved in this case. Surmise will not supply the answer. The burden was on the Government to prove that the two alleged sales on January 7, 1966 and April 6, 1966 and the alleged possession on June 28, 1966 involved on each date a narcotic drug which could be administered for addiction purposes in the sense which Congress contemplated to be a danger to society. Because the Government failed to meet this burden of proof, this Court should reverse the conviction.

B. THE DISTRICT COURT ERRED WHEN, WITHOUT ANY INTERROGATION BY COURT OR COUNSEL, IT EXCUSED AN INFORMANT WHO WAS CALLED AND SWORN AS A WITNESS FOR THE APPELLANT BUT WHO DID NOT CLAIM ANY PRIVILEGE AND DID NOT INFORM THE COURT OF ANY FACT IN HIS PROSPECTIVE TESTIMONY WHICH COULD OR MIGHT IMPLICATE HIM AND CREATE THE DANGER OF HIS CONVICTION FOR CRIME.

Sometime during the trial the prosecutor furnished counsel for the appellant with the identity of the informant who was present at the alleged narcotics sale on February 7, 1966. The only conduct of the informant, John Williams, was to summon the appellant to his car and to inquire of him, in the presence of the undercover agent, whether he had narcotics to sell. When the appellant answered in the affirmative the informant became and remained silent and Mordecai, the undercover agent, asked the price and the appellant gave the answer. A sale, thereupon followed, in terms of a delivery to Mordecai by the appellant of two envelopes containing white powder and payment to the appellant by Moredcai of $20.

Before the appellant rested his case he called Williams as a witness and had him sworn. Counsel for the appellant informed the court that his purpose was to elicit testimony pertaining to matters of identity, entrapment and details of the alleged February 7, 1966 sale. The trial judge, sua sponte, outside the presence of

the jury, told Williams that although the appellant had called him to testify for the defense, he, Williams, was privileged either to testify or to refrain from doing so. The judge further told Williams that any statement he made could and might be used against him in a proceeding the Government might bring against him. Williams then stated that he desired to remain silent. The court thereupon excused him and he departed.

The trial judge committed reversible error in excusing, on his own motion, Williams as a witness for the defense. The colloquy, set forth in full in Appendix B, page 4a, infra, shows that Williams did not claim the privilege against self-incrimination and did not inform the court of any fact connected with the February 7, 1966 incident which could or would or might have exposed him to the danger of a punishment, forfeiture, or penalty. According to Mordecai, the undercover agent who said he bought narcotics from the appellant, all Williams did as the informant was to call the appellant to his car and ask him whether he had narcotics to sell.

It is clear that Williams was neither a seller nor a purchaser. Cf. Green v. United States, - U.S. App. D.C. -, No. 20,039 decided June 30, 1967. He acted simply as the agent for Mordecai in bringing him and a prospective seller together. Mordecai's purpose was to

pretend that he was an addict and thus to buy narcotics from suspected suppliers. What Williams, as an informant, did was to assist a government agent acting within the scope of his official duties. Since Williams was neither a seller nor a buyer of narcotics in relation to the February 7, 1966 incident he had not committed any offense charged in the indictment. This point is aptly stated in United States v. Moses, 220 F.2d 166, 168 (3d Cir. 1966) where the court observed that a participant "in a particular transaction must be punished either as a seller or as a buyer. There is no general offense of participation in the transaction viewed as a whole." Since the purchase by Mordecai, as an undercover agent, was not an offense, Williams' limited aiding and abetting the purchase in behalf of Mordecai was not an offense. See Henderson v. United States, 261 F.2d 909, 912-913 (5th Cir. 1958); Colosacó v. United States, 196 F.2d 165 (10th Cir. 1952); United States v. Titus, 210 F.2d 210 (2d Cir. 1954); Edwards v. United States, 286 F.2d 681 (5th Cir. 1960).

In view of the noncriminality of Williams' conduct while acting as an agent for the government officer, Williams would not have been entitled to claim the privilege against self incrimination even if he had

asserted it. The court in United States v. Weinberg, 65 F.2d 394, 395 (2d Cir. 1933) correctly stated the controlling doctrine when it said that to justify silence under the constitutional privilege against self incrimination "it must appear that an answer to the question will directly tend to incriminate; a remote possibility of danger will not suffice." (citing authorities) In United States v. Weisman, 111 F.2d 260 (2d Cir. 1940) the court discussed the kind of fact which tends to "incriminate" a witness who claims the aforesaid privilege. The court analyzed the leading case of Mason v. United States, 244 U.S. 362 (1917) where the defendant raised this specific question. Judge L. Hand for the court expressed the rationale in Mason as follows:

> Yet it is also true that an affirmative answer would have been an admission of one of the three elements of which their guilt would be composed ···. Nevertheless, we think that the decision did not necessarily go further than to hold that not even answers which directly "tend" to prove the crime are inevitably protected; that there must be some reason to fear that the disclosure will put the witness in pressing danger. Indeed, perhaps in the end we should say no more than that the chase must not get too hot; or the scent, too fresh. (111 F.2d at 263)

Wigmore, Evidence (McNaughton Ed. 1961), Secs. 2254 - 2257 cites ample authority for the proposition that

to be included within the privilege, a fact must expose the one claiming the privilege to danger of a penalty, punitive forfeiture or criminal conviction. The record is therefore devoid of any basis for Williams to assert the privilege if he had seen fit to do so.

The trial judge's invoking, sua sponte, the privilege which was not asserted and could not be claimed by Williams, in view of the noncriminality of his acts, prejudiced the appellant. Being thus foreclosed by the court, the appellant could not develop through Williams evidence relating to matters of identity, entrapment and other possible aspects of the alleged sale on February 7, 1966. The Supreme Court, in Roviaro v. United States, 353 U.S. 53 (1957) and McCray v. Illinois, 386 U.S. 300 (1967) discussed the value and need of an informant's testimony in proving issues of identity and entrapment. We cannot and should not speculate on the outcome of the trial and the fate of the appellant's liberty if the informant had testified and had contradicted the prosecution's only witness as to the alleged sale. This Court should therefore reverse and remand for a new trial. Worthy v. United States, No. 20659 - U. S. App. D.C.,- decided August 11, 1967.

C. THE APPELLANT'S RIGHTS GUARANTEED BY THE BILL OF RIGHTS WERE VIOLATED, FIRST, BY THE DELAY OF FOUR AND ONE-HALF MONTHS FROM THE DATE OF THE FIRST ALLEGED SALE OF NARCOTICS AND THE ISSUANCE OF THE COMPLAINT AND, SECOND, BY THE DELAY OF ONE YEAR FROM THE SALE TO THE TRIAL, WHERE, APART FROM THE NARCOTICS, THE PROSECUTION'S CASE CONSISTED SOLELY OF AN UNDERCOVER AGENT'S UNCORROBORATED TESTIMONY THAT HE HAD PURCHASED NARCOTICS FROM THE APPELLANT, AND WHERE, DURING THE TRIAL ONE YEAR AFTER THIS ALLEGED SALE NEITHER THE APPELLANT NOR THE INFORMANT COULD REMEMBER WHAT HAPPENED ON THE DATE IN QUESTION.

This case was tried on January 31 and February 1, 1967. The appellant's conviction of narcotic sales on February 7, 1966 and April 6, 1966 was based only on (a) the uncorroborated testimony of Mordecai, the undercover agent, and (b) the narcotics which he identified. The record is silent as to whether and to what extent he had a complete independent recollection of the events of the first sale. However, his testimony relating to the date of the second sale was completely wrong, as seen in the colloquy between the prosecutor and the undercover agent on pages 29 - 30, 34 - 36 of the transcript. Mordecai testified that the second sale occurred on March 6, 1966 and that he was certain of the date. It was only after he refreshed his recollection by consulting his notes that he admitted he was in error.

Both the appellant and Williams, the informant whom he called as a defense witness, also had vital lapses of memory. The appellant testified that he could not say where he was on February 7, 1966 and April 6, 1966, (Tr. 176 - 177) and that he did not recall entering an automobile in the 1900 block of 14th Street, N.W. in February, 1966 or seeing either of the informants in an automobile on 14th Street. (Tr. 183 - 104) Williams told the court on February 1, 1967, during the trial, that "to be plain and frankly speaking, I don't think I could remember of what occurred over a year ago." (Tr. 195)

This case presents a graphic picture of unreasonable delay which hurt the appellant and which his counsel on this appeal cannot attribute to him. The appellant was arrested on June 28, 1966 pursuant to a complaint by Mordecai and an arrest warrant issued on June 24, 1966. The record is devoid of evidence as to the reason, if any, for (a) the delay of four and one-half months between the alleged February 7, 1966 sale and the arrest and (b) the passage of one year from this date until the trial.

We submit that the rationale of Ross v. United States, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965) and Hardy v. United States, -- U.S. App. D.C., --, No. 20, 183, decided June 19, 1967, apply here and require a

reversal. In Ross, this Court reversed because "there was an undue subordination of appellant's interests which should not, at least in a record as barren of reassuring corroboration as this one, result in a sustainable conviction." In Brooke v. United States, -- U.S. App. D.C., --, No. 20,241, decided April 19, 1967 this Court noted that in Ross there was a claim of (a) unreasonable delay between the offenses and the arrest, (b) mistaken identity, (c) loss of evidence, (d) impairment of memory, and (e) non-corroboration of the undercover agent's testimony. In Hardy, Judges Bazelon and Fahy approved the holding and rationale of Ross. They said that the lapses of memory of the appellants and the undercover agent in the Hardy case undermined their confidence in guilt of the appellant.

The record shows that if the appellant did make the sale on February 7, 1966 we may properly infer that the charge against him and the trial were delayed for an unreasonable, oppressive and unjustifiable time after the offense as to prejudice him. This amounted to a denial of due process. Nickens v. United States, 116 U.S. App, D.C. 338, 340, N. 2, 323 F.2d 808, 810, n.2 (1963).

D. THE DISTRICT COURT ERRED IN REFUSING THE APPELLANT'S REQUEST TO INSTRUCT ON THE DEFENSE OF ENTRAPMENT.

The jury in this case accepted the testimony of the undercover agent and rejected that of the appellant in reference to the alleged February 7, 1966 sale. The testimony of each was uncorroborated. In view of the verdict, we may assume, without conceding, for purposes of analysis, that on the record, the appellant made the alleged sale. And on the record we must assume that prior to the appellant's encounter with the informant and the undercover agent, the appellant lacked a predisposition to sell narcotics. We must also assume that if the informant had not called the appellant to his car and asked him whether he had narcotics to sell, the sale would not have been made. There is nothing in the record to suggest that the appellant had ever sold or tried to sell or evinced an interest in selling narcotics.

If the trial judge had instructed on entrapment the jury might properly have found that the informant induced the appellant to make a sale which he was not predisposed to make. Under the circumstances the informant admittedly was a governmental representative within the meaning of the entrapment doctrine, and an instruction on this subject was both proper and essential. Brooke v. United States, -- U.S. App. D.C. --, No. 20,241,

decided April 19, 1967. See also Sherman v. United States, 356 U.S. 369 (1958); Masciale v. United States, 356 U.S. 386 (1958); Johnson v. United States, 115 U.S. App. D.C. 63, 317 F.2d 127 (1963); Hansford v. United States, 112 U.S. App. D.C. 359, 303 F.2d 219 (en banc 1962).

We may aptly conclude discussion on this point by quoting from the analogous leading case of Sorrells v. United States, 287 U.S. 435 (1932) which held that the defense of entrapment may be raised under a plea of not guilty. At page 441 the Court said:

> There was no evidence that the defendant had ever ··· sold intoxicating liquor prior to the transaction in question.
>
> It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it ··· and that the agent lured defendant, otherwise innocent, to its commission by ··· solicitation ···.

And at page 452 the Supreme Court said:

> We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and that the trial court was in error in holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury.

The District Court erred in refusing the appellant's request to instruct on the defense of entrapment, and accordingly committed reversible error.

E. THE APPELLANT DID NOT RECEIVE ADEQUATE EFFECTIVE ASSISTANCE OF COUNSEL BEFORE, DURING, AND AFTER THE TRIAL.

The appellant's court-appointed counsel is impelled, reluctantly, to raise the serious question whether his client's court-appointed attorney in the trial court rendered adequate effective assistance. According to the Washington Evening Star for August 4, 1967, Leonard L. Leimbach, the lawyer in question, died on August 3, 1967.

The original record and transcript filed in this Court show that Mr. Leimbach was appointed on August 15, 1966 to represent the appellant in the trial court. During the period from August 15, 1966 through February 1, 1967 when the trial ended, Mr. Leimbach did not present any motions (a) to suppress, (b) to sever counts, (c) to obtain discovery and inspection of tangible and intangible items of information helpful for an adequate investigation and defense of the case, including but not limited to relevant statements, fingerprints, photographs, names and addresses of witnesses ... with knowledge of the facts of the case, police and

federal investigative-agency records. A plausible explanation for this inaction is that during this period, according to the records of the Clerk of the District Court, Mr. Leimbach was the court-appointed attorney in four cases in that court listed as follows:

Date of Appointment	Case Number	Name of Defendant	Charge
8/15/66	931-66	Jones	Narcotics
9/13/66	1015-66	Damon	Housebreaking & Larceny
10/5/66	1141-66	Smith	Robbery et al.
11/29/66	1253-66	Williams	Carrying dangerous weapon.

When the trial began the appellant told the trial judge he was not satisfied with Mr. Leimbach and wanted another lawyer. He also told the court in effect that he and Mr. Leimbach had conferred only twice between August 15, 1966 and January 31, 1967. The latter made no reply or comment to this remark. (Tr. 4 - 5)

The charges of sales of narcotics were proved only by the uncorroborated testimony of the undercover agent. Mr. Leimbach did not cross-examine as to details of the identification of the appellant. Mordecai, the undercover agent, testified that prior to February 7, 1966, when the first alleged sale was made, he had not

known or ever talked with the appellant but had seen him previously. On direct examination Mordecai had a lapse of memory as to the date of the second alleged sale on April 6, 1966. In view of (a) the passage of one year from the first sale to the trial, (b) the lack of corroboation and (c) the lapse of memory, it appears, in retrospect, that in view of Mordecai's identification, he should have been tested on cross-examination as to his memory and identification, in terms of at least (a) the length of time he was an undercover agent, (b) the number of purchases he had made, (c) the number of sellers he had met, (d) the number of complaints he had filed, (e) the number of new contacts he had made, (f) the number of people he had seen, (g) the possibility of mistaken identity, and (h) the times, places and dates when he saw the appellant.

Undercover Agent Samuel Reed testified in relation to the February 7, 1966 and April 6, 1966 alleged sales. On each occasion he was parked on the east side of the 1800 block of 14th Street, N.W. On the first date he could not identify the person who entered the car occupied by Mordecai in the 1900 block of 14th Street, but on the second, he did, as seen in the followingqquestions and answers on page 55 of the transcript:

QUESTION: What happened? What did you observe, rather, after they pulled up in front of this pool hall:

ANSWER: Immediately after they pulled up, I observed this individual, Mr. Jones (pointing) come out from the pool hall, approach the car Agent Mordecai was driving and get into the front seat of the car.

QUESTION: How long did he remain in the automobile?

ANSWER: Approximately three to five minutes.

QUESTION: And what happened after he left the automobile?

ANSWER: He got out of the automobile and re-entered the pool room.

Attorney Leimbach did not cross-examine Reed.

According to the record, Mr. Leimbach did not ask the trial judge to give any instructions and he did not say anything in his jury argument about the weaknesses of the prosecution's case in terms of (a) Mordecai's uncorroborated testimony, (b) his lapse of memory, (c) his questionable identification, and (d) the absence of evidence as to appellant's pre-disposition to sell narcotics.

Appellant's counsel is well aware that in the stress of a trial the best advocate is subject to

defective memory, distracted attention, poor judgment and wrong decisions. However, the tenets of effective ethical trial strategy suggest that the undercover agents could have been mistaken in their identification of the appellant in view of the character of their vocation and the passage of time. The record does indicate that cross examination along these lines could do no harm and perhaps could do some good in eliciting evidence in relation to the crucial issue of mistaken identity. Counsel for the appellant is at a loss to understand why Mr. Leimbach failed to present to the court certain questions, particularly those of insufficient heroin content, non-applicability of the privilege against self incrimination and the unreasonable length of time between (a) the first sale and the complaint and arrest, respectively, and (b) the first sale and the trial.

An objective appraisal of the performance of the appellant's trial counsel is indeed difficult, if not impossible, to make. Since value judgments, when made in the tensions of a criminal trial, are largely subjective, the appellant's counsel on this appeal does not know and hence does not assert that the trial counsel's action and inaction, respectively, amounted per se to such a denial of the appellant's rights as to compel a reversal of his conviction. On this record, counsel

for the appellant does represent that there is sound reason to doubt that, in the context of this case, the appellant received such assistance of counsel as would satisfy constitutional standards. Moreover, there is some basis for "an informed speculation that appellant's rights were prejudicially affected." Anderson v. United States, 122 U.S. App. D.C. 277, 279, 352 F.2d 945, 947 (1965). If "reasonable doubt" exists as to whether the appellant has been denied effective assistance of counsel, he is entitled to a new trial. Lollar v. United States, -- U.S. App. D.C. --, No. 20,300, decided March 20, 1967. Slip Opinion page 7. As a minimum, we contend that, viewed together with the other errors hereinbefore discussed, the trial attorney's performance supplies part of the basis for reversal.

CONCLUSION

For the reasons stated, the judgment of conviction should be reversed. Depending on the basis of reversal, the District Court should be instructed to enter a judgment of acquittal, or a new trial should be ordered.

Respectfully submitted,

MILTON A. KALLIS
Attorney for Appellant
Appointed by this Court

APPENDIX A

Statutory Provisions

1. Sections 4704(a) and 4705(a) of the Internal Revenue Code of 1954, 26 U.S.C. Sections 4704(a) and 4705(a), read as follows:

> SEC. 4704. (a) General requirement. -- It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.
>
> * * * * *
>
> SEC. 4705. (a) General requirement.-- It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.
>
> * * * * *

2. Section 2(c) and (f) of the Act of February 9, 1909, 35 Stat. 614, as amended, 21 U.S.C. Section 174, reads as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more

than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

* * * * *

APPENDIX B

Colloquy in Open Court Outside
Presence of Jury Involving Informant
(Transcript Pages 189 - 196)

JOHN WILLIAMS

was called as a witness by the defendant, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE COURT: Will counsel come to the Bench?

(Whereupon counsel approached the Bench and the following proceedings were held:)

THE COURT: In view of the fact this man is in jail and presumably is awaiting trial, I think the Court should give him advice as to his right to remain silent.

MR. LEIMBACH: Yes.

MR. ELLENHORN: Absolutely.

MR. LEIMBACH: I think first, Your Honor, would you find out whether or not he is waiting for trial.

THE COURT: All right.

MR. ELLENHORN: I am certain he is.

THE COURT: I will ask him.

MR. ELLENHORN: Even if he is not waiting trial, he still should be given the same advice.

THE COURT: All right.

MR. ELLENHORN: I think he still should be given advice as to his rights.

MR. LEIMBACH: I want it understood that I am calling this witness on the direct demand of my client.

THE COURT: You are entitled --

MR. LEIMBACH: As counsel my better judgment would be not to call this witness and I would not do that but for the fact that I am directed to do this thing by him and I have no choice.

THE COURT: I understand.

MR. ELLENHORN: Do you think we should dismiss the jury, Your Honor?

MR. LEIMBACH: No objection.

MR. ELLENHORN: Don't you think we should do this outside the presence of the jury?

THE COURT: I think it would be better if we would let them go out.

(Whereupon counsel resumed their places at the table and the following proceedings were held:)

THE COURT: Ladies and gentlemen of the jury, as far as you are concerned, we will take our mid-morning recess at this time.

You may go to the jury room.

(The jury left the courtroom.)

THE COURT: Mr. Witness, you may sit in the witness chair.

The Court wishes to advise you that you have been called as a witness by the defendant, and that you are, of course, not required to make any statement, and any statement that you may make, particularly a statement under oath, may be used against you in any proceedings which may be brought against you by the Government.

Do you understand your rights?

THE WITNESS: I understand.

I told the defense lawyer down there this morning when he called me and asked me concerning the case -- I told him I didn't want to have anything to do with the case. I won't testify either way on the case.

THE COURT: You are not required to make a statement. You may if you wish to make a statement, but the Court wants you to be clear that anything you say in this case could be used as evidence against you by the Government, in any case that the Government might bring against you.

Now do you understand your rights?

THE WITNESS: I understand my rights.

THE COURT: What is your decision, to testify in this case or not to testify?

THE WITNESS: Well, if I testify the only think that I could testify was what actually happened, anything that happened at all then.

THE COURT: That is correct. You may testify if you wish, but you are not being compelled to testify.

THE WITNESS: If it please the Court, I wouldn't like to have any parts in the case. I won't like to testify either way.

THE COURT: Now, Mr. Leimbach, you have, as the Court understands it, at the request of the defendant called this witness.

You have heard the statement of the witness. He doesn't care to testify.

Is there anything you wish to ask him?

(Mr. Leimbach confers with defendant.)

MR. LEIMBACH: Pardon me.

THE COURT: Certainly.

MR. LEIMBACH: The defendant, and quite properly, I think, tells me that it is his purpose to have the witness testify as to what happened and what he knows that happened. I do not --

THE COURT: At what time, Mr. Leimbach?

MR. Leimbach: At the time of February 7, 1966, and at the time of April 6, 1966. Is that correct, Mr. Defendant?

(The defandant nods affirmatively))

My purpose would be to ask these questions and that is: Was he in the company of a certain person? Did he go with him and seek out or find this man? Did this man sell narcotics to another person?

THE COURT: Now "by this man" do you mean the witness?

MR. LEIMBACH: I mean -- no, I am not suggesting that this witness sold narcotics nor bought narcotics nor did any crime.

The questions would be: Does the witness know a man trading as or presenting himself as or calling himself Nathanial Eagle?

Does he know him by another name as a man by the name of Mordecai?

Did he accompany Mordecai to a certain area on February 7, and was he present when this defendant sold narcotics to Mordecai?

Now all these questions that I am suggesting I would put to the witness are questions that this defendant has suggested that he wants me to put to the witness.

THE COURT: I understand.

MR. LEIMBACH: For the record, the defendant is nodding agreement. Is that correct, Mr. Defendant?

THE DEFENDANT: That's right.

MR. LEIMBACH: And he has said that that is correct.

THE COURT: Mr. Witness, as the Court previously explained to you, the Court will not require you to give any testimony in this case. If you wish voluntarily to answer the questions that counsel has indicated he would like to put to you, you may do so.

However, the Court has warned you that anything you may say may be used against you in any case the Government elects to bring against you.

Do you understand your rights?

Do you wish to testify or do you wish not to testify?

THE WITNESS: Well, from the dates that he is calling off there, if I would testify, that I wouldn't be doing anything but perjuring myself. On April 7, I was in District jail, so I wouldn't be doing nothing but telling a lie.

So just like I said, Your Honor, I will not, and to be plain and frankly speaking, I don't think I could remember of what occurred over a year ago.

THE COURT: You are speaking now about February?

THE WITNESS: February. I wouldn't --

MR. ELLENHORN: I think, Your Honor, just to clarify the point if I may, the testimony was that Agent Mordecai -- was that this man was there with him on February 7, not on April 6, at which time there was testimony. Well, we didn't get into it, but the testimony would have been that a woman accompanied the agent on April 6.

I have transmitted that information to the defense lawyer. I think there is some confusion about it.

MR. LEIMBACH: Also I might add that the Government counsel has quite fairly and properly instructed me that indeed I was mistaken, that this policeman was not calling himself Nathaniel Eagle. This man calls himself Nathaniel Eagle from time to time.

THE WITNESS: Well, Mr. Attorney, do you have -- because I call - I haven't but one name, that is Johnny Williams.

Do you have any proof that I was calling myself Nathaniel Eagle?

THE COURT: Now, you don't need to say anything. If you wish to testify the Court will call the jury back and you may testify.

If you don't wish to testify, the Court will excuse you.

THE WITNESS: I would like for the Court to excuse me.

THE COURT: Very well.

Under the circumstances, gentlemen, the Court does not feel that you should request any evidence from this witness since he is in jail and may be involved as a result of testimony in any charge the Government may elect to bring against him.

The witness will be excused.

(The witness left the courtroom.)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,973

ROBERT L. JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DAVID N. ELLENHORN,
ALBERT W. OVERBY, JR.,
Assistant United States Attorneys.

Cr. No. 931-66

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Cr. No. 931-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Whether, where the issue is raised for the first time on appeal, appellant's rights were violated by a delay of four and one-half months from the date of an initial alleged sale until the date of his arrest given that (a) another alleged sale occurred but two and one-half months prior to appellant's arrest; (b) a narcotics agent's testimony as to the circumstances of the first sale was corroborated by the testimony of two other agents; (c) his testimony as to the circumstances of the second sale, including identification of appellant the seller of narcotics was corroborated by the testimony of another agent; (d) a warrant for appellant's arrest was sworn out by the narcotics agent to whom appellant had allegedly twice sold narcotics the very day he ceased his undercover activities; and (e) the last offense and the arrest were contemporaneous?

2. Whether appellant's rights were denied by a delay of approximately a year from the date of the commission of the first alleged offense, given the applicable facts above and (a) appellant was arrested on June 28, 1966 and tried January 30, 1967, during which time appellant was free on bond; (b) none of the delay was attributable to the government; (c) at least two weeks of it were caused by appellant and by the priorities given cases involving defendants not released on bail?

3. Whether, where the record disclosed no request for an instruction on entrapment and in fact counsel announced himself satisfied with the instructions this Court need review appellant's contention in this regard; and if so, whether reversible error occurred where appellant in effect pled guilty to the counts as to which he could not contend he was entrapped and there was no evidence

of entrapment which would give rise to the need for such an instruction as to the others?

4. Whether the trial judge, in the absence of an objection from defense counsel, who called one of the informants in this case solely at the insistence of the appellant, committed reversible error in excusing the informant as a witness, when the informant was in jail during one of the transactions appellant would have asked him about, testified that he could not remember as to the other, and upon being warned of his privilege against self-incrimination, declined to testify?

5. Whether, where appellant has admitted possessing heroin, knowing it be such at the time of his arrest, this Court need consider appellant's contention that although there was testimony that heroin was present in capsules and powder obtained from appellant on three separate occasions, the absence of testimony as to the quantity of narcotics possessed or that it was usable should invalidate convictions this charge or on charges arising out of other narcotics transactions, as to which appellant received concurrent sentences, and if so should such a situation give rise to reversible error?

6. Whether, viewing the record as a whole, appellant carried the heavy burden of showing that he received ineffective assistance of counsel?

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OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

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UNITED STATES OF AMERICA, APPELLEE

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed August 1, 1966 appellant was charged with eight violations of the federal narcotics laws. Three separate occurrences gave rise to the indictment. On February 7, 1966 appellant was said to have sold narcotics not in pursuance of a written order for that purpose, facilitated the concealment and sale of narcotics, and sold such narcotics not in the original stamped package. Another trio of identical charges was made with respect to appellant's activities on April 6, 1966. On

June 28, 1966 appellant was arrested pursuant to a warrant issued on June 24, 1966. This event gave rise to the last two charges of the indictment, which were distribution of narcotics not in the original stamped package, and facilitating the concealment and sale of narcotics. The two-day trial began on January 31, 1967 before Judge Gasch. The jury returned a verdict of guilty on each of the eight counts. On March 24, 1967 appellant was sentenced to five years on each count except counts one and four, as to which he received sentences of from 20 months to five years. The sentences were to run concurrently.

The Sale on February 7

Joseph Mordecai, an undercover treasury agent, was the principal witness for the government. He met agents Reed and Bland and an informant at his office then went to 14th and U Streets, Northwest around 3 o'clock p.m.[1] (Tr. 23, 58) Reed and Bland were in an unmarked car positioned to face the car in which Mordecai and the informant were riding (Tr. 51, 58-59). The informant pointed out "Boscoe", later identified as appellant, to Agent Mordecai, who did not know appellant but had seen him in the area (Tr. 23-24). The informant stopped the car and called appellant over (Tr. 24, 51, 59). The informant then asked appellant if he was "in shape", a slang term for whether appellant had any narcotics for sale. Mordecai testified that "[Appellant] said yes, he had some nice bags"[2] (Tr. 25). In response to Mordecai's query as to the cost of a bag and how many bags appel-

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[1] The record disclosed that appellant knew one of the informants, John Williams, who called the appellant "Bos", an abbreviated form of the nickname "Boscoe". The informant's wife, an informant with respect to the second alleged sale, also referred to appellant as "Bos" (Tr. 44, 183, 185-187). Appellant acknowledged that they referred to him by that name (Tr. 185, 187).

[2] Agent Mordecai described a bag as "a small . . . glascene envelope in which the heroin is contained" (Tr. 25).

lant had, appellant gave a price of $10 a bag and said that he had two bags. Mordecai then purchased the two bags with official advance money (Tr. 25, 26).

After some conversation, appellant left the car and Mordecai and the informant drove off. Around 3 o'clock that day, the surveilling Agents Bland and Reed had seen someone get into the car with Mordecai and the informant, remain in the back seat for three or four minutes, and get out of the car. Neither could identify the person involved, but Reed testified that the person was a Negro male (Tr. 51-52, 58-59).

Mordecai and the other agents then met at a rendezvous point, where he told them what had happened and showed them the two glascene envelopes (Tr. 27, 52, 60). Moredecai initialled and dated the envelopes and gave them to Agent Reed, after performing a preliminary field test the results of which indicated the presence of a derivative of opium (Tr. 27, 52-53). The envelopes were turned over to Mr. Steele, the U. S. Chemist, the next day (Tr. 27, 53, 60).

The Sale on April 6

At about 3:30 p.m. on this date, Mordecai and an informant were in a car in the same section of 14th Street. Mordecai saw appellant coming out of a pool hall and parked nearby. The informant called appellant over to the car and asked him if he was "doing", a slang term for selling narcotics (Tr. 30). Mordecai described what happened as follows:

> He said yes to the informant, and I told him to get in the car. He got into the car, sat in the front seat next to the informant. I asked him what did he have. He said he had some nice bags. I asked him the price. He said it was $12 a bag. . .
>
> I counted out $35 and told him this was all I had and he agreed to sell the three to me for $35. I then gave him the $35. He in turn gave me three glascene envelopes . . . each containing a white powder.

> [Appellant] then got out of the car. The informant and I left the area . . . [and] again met with Agent Reed (Tr. 31-32).

Agent Reed was the sole surveilling agent on this occasion. He said he saw appellant (pointing him out in the courtroom) get into the front seat of the car Mordecai was driving, stay there three or four minutes, get out and go back into the poolroom (Tr. 55).

Reed and Mordecai met at the Internal Revenue building around 4:00 p.m. Mordecai showed Reed three glascene envelopes and conducted a field test for narcotics, the results of which were positive (Tr. 55). Mordecai dated and initialled the envelopes and gave them to Reed (Tr. 32, 36, 55). The envelopes were subsequently delivered to the U. S. Chemist (Tr. 56).

The Arrest of June 28

On June 24, 1966 Agent Mordecai obtained an arrest warrant for appellant. He next saw appellant on the afternoon of the 28th at the corner of 14th and U Streets (Tr. 37-38). Mordecai did not participate in the arrest. Instead he telephoned the Treasury Department, a radio directive from which resulted in the arrest of the appellant by an Agent Stutman at 6:40 p.m. A search of appellant after the arrest disclosed a Kool cigarette package containing 18 narcotics capsules (Tr. 64). Agent Stutman delivered these items to the U. S. Chemist the next day (Tr. 65).

The Testimony of the United States Chemist

On the second day of trial John Steele, an analytical chemist specializing in analysis of narcotics and dangerous drugs, began his testimony. After being qualified as an expert by stipulation, he identified an envelope received from Agent Reed on February 7, 1966 (Tr. 154-54). His analysis of the white powder contained in two glascene envelopes found in the larger envelope found

"heroin hydrochloride, a derivative of opium, a narcotic drug, quinine hydrochloride and mannitol", both of the latter of which substances are used to dilute the heroin (Tr. 154). The chemist testified that he had 500 milligrams of a white powder before analysis and 480 milligrams thereafter (Tr. 154).

Similar testimony followed with respect to narcotics obtained from appellant on April 6, 1966. The same mixture of substances were found. Before analysis, there were 240 milligrams of a white powder, and after analysis there were 220 milligrams (Tr. 156).

The chemist further testified that on June 29, 1966 he received from Agent Stutman an envelope containing a Kool cigarette package, which in turn contained 18 capsules containing a white powder (Tr. 157). Three of those capsules contained no narcotics.[3] Analysis of the remaining 15 capsules revealed heroin hydrochloride, milk sugar and mannitol, but no quinine hydrochloride (Tr. 157). There were 320 milligrams of a white powder before analysis of the 15 capsules and 260 milligrams thereafter (Tr. 157).

On cross-examination, defense counsel asked Steele if he was able to come to a conclusion with respect to the proportions of the substances in the capsules recovered as the result of the arrest. He responded that he only performed a qualitative, not a quantitative analysis, and that the percentages were unascertained (Tr. 161). He said that the procedure used could detect heroin hydrochloride percentages "ranging from 100 percent down to a very few traces". Counsel then focused on the substances involved in the second sale. This colloquy followed:

> [DEFENSE COUNSEL]: Well could the Court and the jury understand from your testimony that your examination would have disclosed whether or not there were traces of . . . heroin hydrochloride,

[3] Mr. Steele testified that there were 116 milligrams in the three capsules.

> or could they believe that it was almost pure heroin with only traces of the quinine and the sugar?
>
> [THE WITNESS]: I have a separate type of examination when I am looking for just traces and the amount of the drug in this particular sample was sufficient to put it above a trace. . .
>
> I perform it . . . when the amount of the drug that is present is too small to weigh, so the amount is traced and I perform analysis to ascertain whether or not a narcotic or a dangerous drug is in this small minute quantity—quantity of material which has been designated a trace to begin with before the analysis.
>
> [DEFENSE COUNSEL]: But at the time you got through with this examination, is it my understanding . . . that you did not know whether or not you had almost pure heroin hydrochloride or simply traces of heroin hydrochloride?
>
> [THE WITNESS]: I don't know how much I had, but from my examination, the procedures I used, I can deduce it was more than a trace present (Tr. 163-64).

Counsel elicited parallel responses from the witness with respect to the substances obtained from the transaction of February 7, 1966. The witness said:

> I can deduce it was not traces and the mere fact that I had two diluents in there, it was not almost pure. So I didn't determine the exact amount of the drug, but it was of a sufficient amount to be designated not a trace, ... (Tr. 165).

Mr. Steele went on to explain how he used the word traces:

> "Well, I use the word "traces" in the sense that when I get a compound or mixture of compound, that the amount of material there is so small that the balance I use to weigh the compound or mixture of compound is not accurate enough to give meaningful weight analysis, so we just designate it trace from

> the mere fact that you can't get a good weight on it. . . .
>
> I only use it to designate the amount of material that I received as too small to get an accurate weight with the semi-micro balance I use for weighing the substances.
>
> And I designate the drug found as a trace only when I have designated the original sample as a trace, and here I have an accurate weight of the mixture which I analysed (Tr. 165, 168).

After cross-examination counsel approached the bench. Defense counsel indicated his dissatisfaction with the legal posture of the case with respect to the quantity of narcotics involved and requested permission to raise the issue later without prejudice (Tr. 171). The trial judge denied the motion, opining that the evidence adduced was that "there was more than a trace". He pointed out that "[Steele] said he used 'traces', the term 'trace', under certain circumstances, but he didn't find it necessary to do that in this case" (Tr. 171).

The Appellant's Testimony

Appellant claimed that he never sold drugs to Mordecai and that he saw Agent Mordecai for the first time at a hearing before the U. S. Commissioner subsequent to appellant's arrest (Tr. 174-75, 176). He said he knew informant John Williams and his wife Ann because they were drug users, as was he, and that he used 8 capsules or $50 to $60 worth of drugs quotidinally (Tr. 175-176).

Appellant testified that he could not remember where he was on February 7, 1966 or April 6, 1966, but he did remember that on June 28, 1966 he was arrested. He admitted having "some capsules of narcotics" but he could not remember where he had brought them (Tr. 177). He thrice pointed out that he supported his habit by stealing, and testified that he did not support his habit by selling narcotics (Tr. 177-78).

On cross-examination appellant testified that he went to the corner of 14th & U Streets about half an hour before the arrest to obtain drugs. He succeeded in buying some narcotics which he said were the same narcotics which were obtained upon his arrest (Tr. 182). Appellant testified that he knew they were heroin at that time (Tr. 182). He buttressed his testimony that he could remember nothing as to the dates of the sales, testifying that he had never seen either informant on 14th Street in an automobile, and reiterated that he had never sold narcotics to support his $50 to $70 a day habit, but instead stole and engaged in confidence games (Tr. 183, 184, 187).

The Witness' Refusal to Testify

Informant John Williams' name was divulged to the defense by the Assistant United States Attorney. On the second day of trial Mr. Williams was called as a witness for the defense against the "better judgment" of trial counsel but at the insistence of appellant. What next transpired is set out in the appendix to appellant's brief, to which we respectfully direct the Court's attention.

The Claim of Incompetence of Trial Counsel

Because of the diffuse nature of this claim the government will deal with the various aspects of the factual background to this problem in its argument on this point.

The "Request" for Instructions on Entrapment

After the judge's instructions to the jury, defense counsel announced himself content with them. The jury left to begin deliberations, after which the following colloquy occurred:

> [DEFENSE COUNSEL]: Your honor, I have a small piece of business. At the direction of the defendant I am requested now and I move for a judgment of acquittal, that there is a defense of entrapment presented.

[THE COURT]: The motion is denied as untimely. Besides there is no evidence of entrapment in this case.

[DEFENSE COUNSEL]: I understand. Thank you, Your Honor.

[THE COURT]: Very well.

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, United States Code, Section 4704(a), provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima

facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, United States Code, Section 4705(a), provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SUMMARY OF ARGUMENT

Since appellant in effect admitted his guilt as to the two narcotics counts arising out of his possession on the day of his arrest of capsules he knew contained heroin and received concurrent sentences as to the counts arising out of the first alleged sale, there is no reason to consider appellant's contention that the passage of four and one-half months from this sale to his arrest violated his rights. Appellant's claim fails on the merits as well. His brief blithely ignores the fact that another alleged sale took place but 2½ months before appellant's arrest, and that his last offense took place at the time of his arrest. But even if we look only at the longer period, it falls short of the seven month delay condemned in *Ross* and within periods upheld in other cases. Nor are other factors which gave rise to the *Ross* decision present here. Because the trial was not one at which the case against appellant consisted of the recollection of one witness refreshed by a notebook, but instead one at which there was ample corroboration of the apparently independent recollection of the narcotics undercover officer, the risk of erroneous conviction on the basis of a faulty identification was minimal. The factual situation here did not present "dimensions as slender as *Ross*". The existence of an intervening offense shortening the period until arrest to an unquestionably justifiable 2½ months makes unneces-

sary inquiry into the reasonableness of the longer period. But even the longest time lag here involved was of an order obviating the necessity for inquiry into the reasonableness of the police purpose in avoiding the disclosure of the undercover agent.

Appellant's rights were not denied by the passage of a year between the first offense and the trial. Again, he conveniently forgets that other offenses were committed in the interim, including those committed on the day of his arrest. Ordinarily, Sixth Amendment rights accrue then. Seven months elapsed between arrest and trial, a period neither arbitrary, purposeful, oppressive or vexatious. None of the delay could be attributed to the government. Two weeks of it could be attributed to appellant. During the applicable period appellant was on bond. No prejudice has arisen from these circumstances, nor has appellant demonstrated any.

Appellant bemoans the denial of a request for instructions on entrapment. The record discloses no such request. While that should end the matter, we note that trial counsel announced himself satisfied with the instructions as given, so that it is too late now to challenge them. Moreover, appellant cannot contend that he was "entrapped" into possessing narcotics at the time of his arrest. The existence of this valid count, as to which appellant received concurrent sentences with the others, erases the need for further inquiry. In any event, the entire record disclosed no evidence of entrapment as to any of the counts.

The trial judge correctly excused from testifying for the defense an informant who declined to testify upon being warned of his privilege against self-incrimination. It was clear that the witness was in jail during one of the sales, and so could not testify at all as to it. And the record disclosed that the witness could not remember the circumstances of the other sales in any event. Therefore, it could hardly be said to be error, much less prejudicial error, to excuse such a witness at his own request.

Appellant argues that his convictions were invalid because the amount of narcotics was minute and there was no proof that the substance could be used as a narcotic. Again, appellant's admission that he knowingly possessed heroin at the time of arrest, thus giving rise to valid counts, obviates the necessity of considering appellant's contentions with respect to the remaining counts. In any event, no deficiency existed with respect to the other counts. The chemist who analyzed the substances obtained from appellant testified that he could deduce that more than a mere trace of narcotics was present. Put more simply, this is just not a "traces" case. Cases which require quantitative proof in addition to qualitative proof fly in the face of both statutory interpretation and policy. In addition they should be rejected, as this Court already appears to have done, because they reflect policies arising from a combination of distinguishable factual situations and preoccupation with knowledgeable possession where the narcotics involved may be undetectable by a user. It has been said that the majority rule is to the effect that the possession of narcotics is illegal regardless of the amount involved. Appellee submits that this or a similar rule ought to be followed in this jurisdiction, and notes that even in a jurisdiction purporting to follow the rule for which appellant contends, sale of any amount of narcotics is held by the Court to be within applicable statutes.

Appellant failed to meet the heavy burden of showing that the assistance of counsel be received was constitutional defective. The record shows he actively, intelligently and diligently protected appellant's interests. On the whole, counsel did a good job with a weak case.

ARGUMENT

I. The delay between offense and arrest did not deny appellant due process of law.

(Tr. 24-26, 30-36, 45, 47-48, 50, 52, 55, 176-177, 181-182, 184-187, 222)

Appellant contends for the first time on appeal that his rights were violated by a delay of four and a half months from the date of the first alleged sale until his arrest. But appellant was convicted on at least one valid count, inasmuch as his own testimony established his guilt as to the eighth count of the indictment (Tr. 177, 181, 182, 222). As to that count, the offense and the arrest were contemporaneous. Since concurrent sentences were received on all counts, this Court need not consider appellant's contentions with respect to the remaining counts. *Hirabayashi* v. *United States*, 320 U.S. 81, 85 (1943); *Worthy* v. *United States*, 122 U.S. App. 242, 352 F.2d 718 n.1 (1965), *vacated on other grounds*, 384 U.S. 895 (1966) (unnecessary to review appellant's contentions involving 6 months delay where lesser period of delay not inquired into); *Redfield* v. *United States*, 117 U.S. App. D.C. 231, 328 F.2d 532, *cert. denied*, 377 U.S. 972 (1964). See *Mackey* v. *United States*, 122 U.S. App. D.C. 97, 351 F.2d 794 (1965).

The substance of appellant's contentions, if reached by this Court, presents a familiar problem. Since *Ross* v. *United States*, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965), many cases have arisen in which the length of time from the commission of a narcotics offense until the time of complaint or arrest has been claimed to have prejudiced appellant's rights. Usually, such claims have been rejected because of the absence of factors basic to the application of the *Ross* doctrine. See, *e.g.*, *Bey* v. *United States*, 121 U.S. App. D.C. 337, 350 F.2d 467 (1965), *cert. denied*, 385 U.S. 905 (1966); *Mackey* v. *United States*, 122 U.S. App. D.C. 97, 99, 351 F.2d 794, 796 (1965) (concurring opinion of Washington, J.);

Cannady v. *United States*, 122 U.S. App. D.C. 120, 351 F.2d 817 (1965) (rev'd on other grounds); (*Francis E.*) *Jackson* v. *United States*, 122 U.S. App. D.C. 124, 351 F.2d 821 (1965); *Powell* v. *United States*, 122 U.S. App. D.C. 229, 352 F.2d 705 (1965); *Worthy* v. *United States*, 122 U.S. App. D.C. 242, 352 F.2d 718 (1965), *vacated on other grounds*, 384 U.S. 895 (1966); *Roy* v. *United States*, 123 U.S. App. D.C. 32, 356 F.2d 785 (1965); *Daniels* v. *United States*, 123 U.S. App. D.C. 127, 357 F.2d 587 (1966); *Godfrey* v. *United States*, 123 U.S. App. D.C. 219, 358 F.2d 850 (1966); *Morrison* v. *United States*, 124 U.S. App. D.C. 330, 365 F.2d 521 (1966); *King* v. *United States*, —— U.S. App. D.C. ——, 369 F.2d 213 (1966), *cert. denied* 389 U.S. —— (1967). See also *Hardy & Ferguson* v. *United States*, D.C. Cir. No. 20183, decided June 19, 1967.[4] Appellant's claim here should be similarly rejected.

As the author of the *Ross* decision has reiterated, the reversal of the conviction turned on "(1) a purposeful delay of seven months between offense and arrest, (2) a plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against the appellant consists of the recollection of one witness refreshed by a notebook." *Woody*, *supra* at ——, 370 F.2d at 218. The "ultimate prejudice that has concerned [the Court] has been the risk of erroneous conviction." *Id.* at ——, 370 F.2d at 216. (Separate opinion by Chief Judge Bazelon.) The key element in determining the extent of this risk has been said to be the quality and the method of police identification of the appellant. *Ibid.*[5]

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[4] Compare *Woody* v. *United States*, —— U.S. App. D.C. ——, 370 F.2d 214 (1966).

[5] Judges McGowan and Burger are of the opinion that the critical issue is the degree of prejudice to the defendant. Both agreed in *Woody* "a delay of four months [was] not so unreasonable as to warrant reversal absent special circumstances", *id.* at ——, ——, 370 F.2d at 217, 220, but the former thought Woody was prejudiced because of (1) appellant's inability to recall the day of the offense; (2) the death of a potentially critical defense witness at an

In the present case, appellant alleges inability to recall the days on which the first and second of the alleged transactions occurred (Tr. 176-77). There the resemblance to *Ross* ceases. Appellant's brief emphasizes a delay from one alleged narcotics rule to the issuance of an arrest warrant of four and one-half months. No mention is made of the shorter period of time from the second alleged transaction to the time of arrest, a period of two and one-half months. Even so, four and one-half months is a far cry from the delay of seven months involved in *Ross*. And delays greater than that of which appellant now complains have been accepted as reasonable despite the accused's alleged inability to remember the events on the date of the offense. *Powell* v. *United States*, *supra* (5 months); *Glover* v. *United States*, D.C. Cir. No. 19498, decided December 7, 1965 (5 months). Compare *Cannady* v. *United States*, *supra* (4 and one-half months from offense until arrest, but appellant testified about the circumstances surrounding the alleged offense). Moreover, since *Ross* this Court, in recognition of the intimation therein that reasonableness may be assumed within an appropriate range of time, has indicated that a delay "of the order of four months" obviated the necessity of inquiry into the reasonableness of the conceded police purpose to avoid the disclosure of the identity of an undercover officer. *Woody*, *supra* at ——, 370 F.2d at 248 (1966); *Worthy* v. *United States*, *supra* at ——, 352 F.2d at 720 (1965). Thus, even considering the longest period of delay, the period involved is not such as to prejudice appellant's rights. Moreover, the existence of an intervening offense shortening the delay involved to an unquestionably justifiable two and one-half months overrides the neces-

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advanced stage of the delay period; and (3) the unavailability because of delay of an eyewitness whose testimony would have directly contradicted that of the undercover policeman. Judge Burger, dissenting, was of the view that appellant had not been prejudiced. In any event, such special circumstances are not present here.

sity for inquiry into the reasonableness of the longer period of delay.[6]

The case against appellant did not consist of the "recollection of one witness refreshed by a notebook." The record does not indicate that the agent relied on his notes pertaining to the transaction of February 7, 1966 during his testimony.[7] The testimony of surveilling agents Reed and Bland corroborated the circumstances of this alleged sale, though neither could identify the person who entered the car as other than a Negro male (Tr. 50). As to the second sale, Agent Reed corroborated the circumstances of the alleged sale and identified appellant as the person who got into the car, remained there for three to five minutes, and then returned to the pool hall from which he had exited (Tr. 55). Thus, the circumstances and testimony as to the first alleged rule are distinguishable from those in *Ross*, and the circumstances

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[6] Of course, the shorter period of delay presents even less of a problem. See, *e.g.*, *Roy* v. *United States*, *supra* (3½ months); *Bey* v. *United States*, *supra* (3½ months); *Worthy*, *supra* (somewhat less than 4 months delay does not require inquiry into reasonableness of police procedure); *Godfrey* v. *United States*, 122 U.S. App. D.C. 285, 353 F.2d 456 (1965). In *Godfrey*, as here, a series of alleged purchases were made by the same undercover officer. The accused focused on the purchase furthest (over 4½ months) removed from the institution of the prosecution. The Court noted that the last of the offenses involved 3½ months delay, a period neither unreasonable nor constituting undue delay. The Court was "unable to see that the delay as to charges for the earlier transactions, when considered in relation to [the latest] transaction, violated any constitutional right of appellant's." *Id.* at 286, 353 F.2d at 457.

[7] The agent testified that after each transaction he went to his office and made personal notes pertaining thereto. Apparently, he prepared the notes in typewritten form "that evening or the next morning" (Tr. 47). The record disclosed that the defense had access to the notes, which appeared to have been in the possession of the Assistant United States Attorney while the agent testified as to the February 7 transaction (Tr. 47-48). Except with respect to confusion as to the date of the second transaction, the record suggests that the agent testified without reference to notes (Tr. 30-32, 33-36). As to both transactions, the agent evidenced considerable ability to recall the circumstances with clarity.

and testimony as to the second sale are even further removed from the *Ross* situation.

This is not a case with "dimensions as slender as *Ross*," *Bey* v. *United States*, *supra*, 350 F.2d at 467, nor is it one which gives rise to a concern for the risk of erroneous conviction. The confrontations during both transactions in question appear to have been of substantial duration (Tr. 24-26, 31-32, 52, 55). The undercover enforcement official was a Treasury Agent of at least five months experience in the narcotics field (Tr. 45). The agent had seen appellant on other occasions in the same area before the first alleged sale occurred (Tr. 24). That the agent had occasion to deal with appellant again a month later, as well as his testimony that it was his identification of appellant on the street after the issuance of the arrest warrant that led to appellant's arrest, strongly militates against the possibility of an erroneous identification. As pointed out above, he related numerous details of the transaction, apparently independently of any notes. Only three and one-half months passed between the second transaction and the swearing out of the arrest warrant. While these factors may not be determinative of the issue, their total effect precludes appellant's reliance on *Ross*.

Nor does the instant case share with *Ross* the dangers inherent in a delayed identification by uncorroborated testimony. Not only the fact that a person entered the car at the time and place of the first transaction corroborated, but as to the second transaction one of the surveilling agents identified appellant as the party who had done so. Indirect corroboration appeared also from the fact that both informants, connected by marital ties, knew appellant by the same nickname—a fact appellant admitted during the course of the trial (Tr. 184-187).

For all the above reasons, appellant's claim that his rights were prejudiced by the delay between offense and arrest should be rejected.

II. Appellant's rights were not denied by a delay of approximately one year from the commission of the first of a series of narcotics offenses to the date of the trial.

Appellant seems to be urging for the first time here that the entire period between the first offense (Feb. 7, 1966) and the trial (January 31 and February 1, 1967) should be considered in determining whether his right to a speedy trial under the Sixth Amendment has been denied.

There may be exceptional circumstances when such a period should be pursued to determine whether this constitutional guarantee has been violated, *Petition of Provoo*, 17 F.R.D. 183 (D. Md.), *aff'd per curiam* 350 U.S. 857 (1955). Delay between offense and arrest presents a discrete due process problem under the Fifth Amendment, but the Sixth Amendment right attaches at arrest, absent unique circumstances. *Powell* v. *United States*, 122 U.S. App. D.C. 229, 231, 352 F.2d 705, 707 (1965); *Hardy* v. *United States*, 119 U.S. App. D.C. 364, 343 F.2d 233 (1964), *cert. denied*, 380 U.S. 984 (1965). The right to a speedy trial is relative, consistent with delays, and turns upon the circumstances in each case. *Beavers* v. *Haubert*, 198 U.S. 77, 78 (1905). The delay must not be purposeful or oppressive. *Pollard* v. *United States*, 352 U.S. 354, 361 (1957). This Sixth Amendment right has been said to be "an important safeguard to prevent undue and oppressive incarceration prior to trial". *United States* v. *Ewell*, 383 U.S. 116, 120 (1966), in which the Supreme Court also pointed out that "in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace." *Ibid.*

The record here disclosed the following pre-trial proceedings. The arrest warrant was issued on June 24, 1966. It was executed four days later on June 28, 1966. The next day, appellant was taken before the United States Commissioner and bail was fixed. Temporary commitment was ordered and medical attention recom-

mended because appellant was undergoing withdrawal symptoms. On July 7, 1966 the delayed hearing on probable cause was held, and appellant was bound over to await grand jury action. The eight-count indictment was filed on August 1, 1966. On August 12, appellant pled not guilty, the case was referred for appointment of counsel and appellant was released on bond. On August 15, appellant's trial attorney was appointed. On January 23, 1967 the case was continued until January 29 at the request of defense counsel. On January 31, the trial began.

Thus, approximately 7 months elapsed between arrest and trial, a period which was neither arbitrary, purposeful, oppressive or vexatious. See *Smith* v. *United States*, 118 U.S. App. D.C. 38, 331 F.2d 784 (1964) (*en banc*). Appellant's physical condition necessitated the initial post-arrest delay of a week. He was released on bond early in the proceedings and so suffered minimal incarceration prior to trial. The case was continued for about one week at the request of defense counsel. We submit that most of the remaining delay was the result of giving priority to cases in which appellants have been unable to secure pre-trial release, a practice implicitly approved in *King* v. *United States*, 105 U.S. App. D.C. 193, 195, 265 F.2d 567, 569, *cert. denied*, 359 U.S. 998 (1959). None of the delay was caused by the prosecution. Compare *Hanrahan* v. *United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965).

Finally, appellant has not demonstrated prejudice resulting from his post-arrest delay. He had no trouble recalling the events pertaining to the eighth count, to which he in effect pled guilty. Having received concurrent sentences as to the other counts, he cannot be said to have been damaged. Moreover, there is no indication that any aspect of his defense deteriorated over the months after he was arrested. Shortly after that arrest, he obtained a full preliminary hearing and was thus made aware of the foundation of the charges against him.

III. This record disclosed no request for an instruction on entrapment, and in fact counsel announced himself satisfied with the instructions as given. Even assuming such a request were made, this Court need not consider whether the lack of such instructions amounted to error because of principles announced in *Hirabayashi* v. *United States*. In any event, there was no evidence of entrapment which would give rise to the need for such an instruction.

(Tr. 10-11, 23, 24, 26, 36, 46-47, 224, 225)

Appellant complains of the trial judge's failure to instruct the jury with respect to the defense of entrapment. As we read the record, no request for an instruction on entrapment was made. In fact, after the trial judge instructed the jury, counsel announced that "the defendant is content, Your Honor" (Tr. 224). When the jury left the courtroom to begin deliberations, counsel indicated that he had been directed by appellant to move for a judgment of acquittal on the ground that a defense of entrapment was presented. Judge Gasch denied the motion as untimely and because there was no evidence of entrapment presented (Tr. 225).

The ruling is supportable on either ground. The motion, even if somehow viewed as a request for instructions [8] as appellant claims for the first time here in the face of counsel's announced satisfaction below, came after the jury had left to begin its deliberations, and was thus clearly too late. *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966); *McKnight* v. *United States*, 114 U.S. App. D.C. 40, 309 F.2d 660 (1962); Rule 30, Fed. R. Crim. P.

Assuming for the moment that this record can be distorted to encompass a request for instructions on entrap-

[8] Appellee submits that appellant's construction of counsel's attempt to placate appellant by recording his objection as a request for instructions plainly cannot be justified on this record. We were unable to find anything in the record even remotely resembling such a request.

ment, this Court need not consider appellant's claim that the absence of such an instruction amounted to reversible error. Appellant was convicted on counts involving, *inter alia*, facilitation of the concealment of narcotics, the sentence for which was made to run concurrently with sentences imposed on other counts involving the sale of narcotics. We take it that appellant does not contend that he was entrapped into carrying the narcotics, especially in the light of his in-court admissions that he did; nor could there possibly be any contention that the evidence raised the possibility that he was "entrapped" into doing so. *Cf. Smith* v. *United States*, 118 U.S. App. D.C. 38, 331 F.2d 784 (1964). Accordingly, it is unnecessary for the Court to review the contention of entrapment as it affects the validity of the sentences on the remaining counts involving the narcotics sales. *Hirabayashi* v. *United States*, 320 U.S. 81, 85 (1942); *Redfield* v. *United States*, 117 U.S. App. D.C. 231, 328 F.2d 532, *cert. denied*, 377 U.S. 972 (1964).

Assuming again that a request for an instruction on entrapment were made, consideration by this Court of the issue would not avail appellant. The evidence failed to present a jury question, so that such a request would have been properly refused. *Redfield* v. *United States*, *supra*; *Berry* v. *United States*, 116 U.S. App. D.C. 375, 324 F.2d 407 (1963); *cert. denied*, 376 U.S. 959 (1964); *Fletcher* v. *United States*, 111 U.S. App. D.C. 192, 295 F.2d 179 (1961); *cert. denied*, 368 U.S. 993 (1962);[9]

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[9] In *Redfield*, the undercover agent approached the seller in a bar and immediately asked him if he had any "pot". The accused replied affirmatively and told the officers to follow him into a men's room where a sale took place (Tr. 23, 24, 26, 36, D.C. Cir. No. 17818). The Court held that the "evidence simply failed to establish the defense of entrapment, not even raising a possible jury question regarding it". 117 U.S. App. D.C. at 232, 328 F.2d at 533.

In *Berry*, an undercover agent, accompanied by another person who had been acquainted with appellant for six or eight months walked up to appellant while he was waiting for a light to change at 13th and U Streets and asked him in the jargon of narcotics users if he had narcotics for sale. Appellant replied affirmatively and sold 15 capsules to the agent's cohort and 6 capsules to the

cf. Johnson v. *United States*, 115 U.S. App. D.C. 63, 317 F.2d 127 (1963) (possibility of entrapment by inducement of accused to buy narcotics with police money and in hopes of reward for buying a question for the jury).

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agent. The Court held that the trial judge's ruling that there was no evidence of entrapment was correct. 116 U.S. App. D.C. at 375, 376, 324 F.2d at 407, 408.

In *Garrett* v. *United States*, D.C. Cir. No. 19449, decided January 26, 1966, undercover officers approached appellant on the street, using slang terms to inquire whether appellant had any narcotics. Appellant indicated that he had, but that it was only of fair quality. When asked for "five things" appellant produced narcotics and the sale was consummated. (Tr. 10-11, 46-47). This Court affirmed *per curiam* in the face of appellant's claim that refusal of a requested entrapment instruction was error.

Appellee submits that this case was not one in which an accused has been "lured by repeated and persistent solicitation", *Sorrels* v. *United States*, 287 U.S. 435 (1932). Nor was it one in which the "Government *play[ed] on the weaknesses* of an innocent party and beguiled him into committing crimes which he otherwise would not have attempted", *Sherman* v. *United States*, 356 U.S. 369, 376 (1958) (emphasis in original); or one in which the accused had been "induced" to commit the crime, *Masciale* v. *United States*, 356 U.S. 386 (1958); or one in which a sale had been induced by false pleas of urgent need by an informant buyer who thus ensnared a person otherwise innocent, see *Hansford* v. *United States*, 112 U.S. App. D.C. 359, 303 F.2d 219 (1962) (*en banc*). Appellant's activities here are clearly within the rule as expressed in *Hansford* that "A person is not entrapped when an officer merely presents him with the opportunity to commit an offense in order to detect criminality rather than to instigate it. *Id.* at 363, 303 F.2d at 222. The manner and facility with which the sales were made here indicated ready compliance on the part of appellant. See *Fletcher*, *supra*. He responded to the slang inquiries directed at him with alacrity, indicated the quality of his wares, which he had in his immediate possession, and named his price. He was "ready, willing and able to make immediate delivery." *Fletcher* v. *United States*, 111 U.S. App. D.C. 192, 194, 295 F.2d 179, 181 (1961), *cert. denied*, 368 U.S. 993 (1962), and it was apparent that appellant was "in business." See *Berry* v. *United States*, *supra*.

Appellee submits that in cases such as this, particularly where appellant completely eschews taking any part in the transactions at issue, "some form of Government activity beyond simply tendering Government-supplied money must be shown before the accused becomes entitled to an entrapment instruction." *Smith* v. *United States*, 118 U.S. App. D.C. 38, 44, 331 F.2d 789, 790 (1964) (*en banc*). No other activity of significance has been shown here.

For all of the above reasons, it is submitted that there was no error, let alone plain error, committed in not instructing the jury on entrapment.

IV. The trial judge correctly excused from testifying for the defense an informant who declined to testify upon being warned of his privilege against self-incrimination. In any event, only harmless error occurred where the witness could only testify to one of three alleged transactions, all of which gave rise to concurrent sentences, and he claimed he could not remember the circumstances surrounding that one.

(Tr. 190-196)

Appellant claims that the trial judge erred in excusing the informant John Williams from testifying on the defendant's behalf. At the outset, this claim must be viewed in the context of the way the record developed. Because Williams was in jail and awaiting trial, the Court indicated it would advise him of his right to remain silent (Tr. 190). Defense counsel, who had apparently had already talked to Williams, made it clear that he was calling Williams as a witness against his better judgment, and that he would not have done so had he not been directed to do so by appellant (Tr. 190, 192). The court acknowledged that the witness was called at the request of appellant (Tr. 193). Appellant wanted Williams to testify as to what happened at the February 7 and April 7 transactions, and wanted answers to general questions, the answers to which were already established or did not carry exculpatory connotations (Tr. 194). As to April 7, Williams testified that he was in jail.[10] As to February 7, the witness testified that he didn't think he could remember what occurred a year ago (Tr. 195).

Williams was told that he was called as a witness by the appellant, that he was not required to make any state-

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[10] In any event, the record indicated that Williams' wife, not Williams' accompanied Mordecai on April 6.

ments but could volunteer to do so; and that any statement, particularly a statement under oath, could be used against him (Tr. 191, 192, 194). Williams made it clear that he did not wish to testify "either way" on the case and asked that the court excuse him (Tr. 192, 196). It did, ruling that "under the circumstances, gentlemen, the court does not feel that you should request any evidence from this witness since he is in jail and may be involved as a result of testimony in any charge the Government may elect to bring against him" (Tr. 196).

Appellant's claim rings hollow in the light of his assertion at trial that he saw neither Agent Mordecai nor Williams on the pertinent dates in question. In any event, that the witness was not present at one transaction and could not remember the other justified the trial judge ruling, particularly in the light of the reason for which the witness was called. Since the defense attorney presumably knew what the informant's testimony would be, the trial court may well have thought that calling Williams was a formal registration on the record of appellant's desires in the matter.

It seems clear that answers to the questions propounded by appellant could have furnished a "link in the chain of evidence" needed to prosecute Williams for a federal narcotics crime, particularly given the nature of Williams' and appellant's past associations. *Cf. Emspak* v. *United States*, 349 U.S. 190 (1955) and we take it that appellant does not seriously contend that an unsophisticated and relatively inarticulate witness must mumble some sort of legalistic phrase in order to be accorded constitutional protection. See *Hoffman* v. *United States*, 341 U.S. 479, 486-87 (1951). It was not "perfectly clear that the answers to any of [the] questions [appellant would propound] could not possibly have tended to incriminate him". *United States* v. *Frascone*, 299 F.2d 824, 827 (2d Cir.), *cert. denied* 370 U.S. 910 (1962). See also *Morrison* v. *United States*, 124 U.S. App. D.C. 330, 365 F.2d 521 (1966) (court has no power to *sua sponte* grant immunity to witness so he

can testify for defendant); *Earl* v. *United States*, 124 U.S. App. D.C. 77, 361 F.2d 531 (1966).

In any event, if error occurred it was harmless error. For assuming arguendo that Williams' claim of self-incrimination was insufficient as a technical matter, the record disclosed he nevertheless could shed no light on either the transaction of February 7 or of April 7, 1967. Excusing a witness who has nothing to say can hardly serve as a foundation for a claim of prejudicial error. (Compare appellant's Br. at 27). Furthermore, the record supports the inference that counsel for appellant had already talked to Williams and as the result of that contact had rejected the idea of calling him to the stand until appellant demanded it. This, we submit, was another indication of the uselessness of compelling him to testify, even if Williams' claimed inability to remember was obviated. Lastly, harmless error only occurred because Williams' testimony, however favorable to the defense, could only have pertained to the events of February 7, 1966, and thus had no bearing on the counts involving the other two transactions, as to which appellant received concurrent sentences.

V. Appellant's conviction is not deficient in any respect with respect to the amount of narcotics involved therein. The relevant statutes contain no explicit or implied exemption for "traces" of heroin. In any event, this court need not consider appellant's contentions in that regard.

A. *This situation is not within the intendment of cases which require proof of a specific quantity of narcotics or usability to support a conviction*

Appellant argues that the convictions of appellant for narcotics violations are invalid because the amount of narcotics involved was "very minute" and "there was no proof of the quantitative sufficiency of the substance for use as a narcotic" (Br. 1, 17). He thus seeks to shield his client under a rule directly or by implication requir-

ing proof of possession of at least a minimum quantity of narcotics to support conviction. The District of Columbia Court of Appeals has expressed this insufficient quantity as "only a trace of a substance, a chemical constituent not quantitatively determined because of minuteness". When the quantity involved may be so described, and "there is no additional proof of its usability as a narcotic", conviction for possession cannot be supported. *Edelin* v. *United States*, 227 A.2d 395 (1967) (adopting the rationale of *State* v. *Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962) (*en banc*)); see also *Johnson* v. *United States*, D.C. Ct. App. No. 4166-67, decided March 28, 1967. Bypassing for the moment the validity or weaknesses of this line of cases, we submit the instant facts do not fall within the proscriptions imposed by such cases.

The record revealed that the chemist performed quantitative but not qualitative analysis of the packets recovered pursuant to the three transactions (Tr. 162, 164, 169). Nevertheless, with respect to capsules recovered pursuant to appellant's arrest, the chemist testified that from the procedures he used, he could deduce that more than a mere trace was present (Tr. 164-165). And, with respect to the amount so recovered, appellant himself testified that he knew it was heroin at the time he was arrested (Tr. 184). Appellee submits that it cannot be gainsaid that appellant's admission obviates the necessity of proof that more than a minute quantity of narcotics was involved or that any particular quantity of narcotics was involved.[11]

It should not be lightly assumed that an admittedly heavy user of narcotics had no better knowledge of his source of supply than to spend $40 to $45 on approxi-

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[11] Analytically, we submit, appellant's testimony with respect to the narcotics pursuant to his arrest amounted to a plea of guilty to the counts arising therefrom. Had he actually pled guilty, no proof as to quantity would have been necessary. The same approach should obtain here.

mately 20 useless caps, which he then secreted away in a Kool cigarette package (Tr. 176, 181-182). Appellant's admission and these circumstances alone negated the necessity for a determination that the amount recovered was more than traces. When coupled with the chemist's testimony that more than a mere trace was present, the occasion for the application of the *Edelin* holding and related doctrines completely disappear, especially when, as here, the amount in issue is in a readily transferable, transportable form instead of residual amounts which have incidentally collected on narcotics paraphernalia and requires some conversion or processing before use can be made of it. See, e.g., *State* v. *Moreno*, *supra* (residue on cotton wads accumulated and used for booster shots); *Greer* v. *State*, 163 Tex. Crim. 377, 292 S.W. 2d 122 (1956) (piece of wet cotton found in bottle cap indicated trace of heroin); *cf. People* v. *Leal*, 50 Cal. 777 (1966) (minute crystalline residue of heroin on narcotics implements).

As the arrest gave rise to clearly valid counts, this Court need inquire no further into the quantity of narcotics involved in the earlier two sales. Nevertheless, similar reasoning applies with respect to those quantities. As to the quantity involved in the first sale, the chemist testified that he could "deduce it was not traces" and that it was of a sufficient amount to be designated not a "trace" (Tr 165). And, as to the quantity involved in the second sale, he explained that "I don't know how much I had, but from my examination, the procedure I used, I can deduce it was more than a trace present" (Tr. 164).[12] The trial judge characterized the evidence as showing more than a trace, and pointed out that the chemist had not found it necessary to use the term in this

[12] The chemist said he used the word "traces" when the amount of material was too small to be accurately weighed with the "semi-micro" balance used for weighing the substances (Tr. 168). He pointed out that here he had an accurate weight of the mixture analysed.

case (Tr. 171).[13] Moreover, the circumstances as to the times and places of the transactions, the manner in which they were conducted and the prices paid for the substances are all matters from which it could be inferred that appellant was in the business of selling narcotics, knowing the substances to be usable quantities thereof. See *Blaylock* v. *State*, 171 Tex. Crim. 665, 352 S.W.2d 727 (1961); see also *State* v. *Winter*, *post* (similar holding by implication). It seems fairly clear, therefore, that the amount involved in both sales was above that miniscule, immeasurable amount that has given some courts pause; and this again is particularly so given the form that the substances were found in.

B. *This Court should hold that there need be no specific quantity of narcotics to support a conviction.*

Determination of the issue raised by appellant must be viewed against the background of the purposes sought to be served by enactment of federal narcotics laws. Referring to these laws, the Supreme Court has recognized that

> "[T]he various enactments by Congress extending over nearly half a century institute a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy. If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter.[14]

Similar attitudes have been expressed by state courts. *E.g.*, *State* v. *Dodd*, 28 Wis. 2d 643, 137 N.W.2d 465 (1965); *State v. Jefferson*, 391 S.W.2d 885 (Mo. App.

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[13] This language was apparently intended to mean that the procedure the chemist said he used was not consistent with the analysis of "traces" as opposed to more substantial quantities of substances.

[14] *Gore* v. *United States*, 357 U.S. 386, 390 (1958).

Div. 1965); *Baldwin* v. *Commonwealth*, 203 Va. 570, 125 S.E. 2d 858 (1962). Possession of this particular narcotic is an object of serious concern to authorities, regardless of the amount detected. In view of the fact that heroin has been described as medically useless and the most dangerous of all drugs,[15] such a policy militates against a judicially established exception based on the small size of the quantities of narcotics which may be involved in criminal prosecutions involving such substances. In addition, the difficulty and lack of success which has been encountered when courts and legislatures have attempted to draw quantitative lines has been recognized. See, *e.g.*, Eldridge, *Narcotics and the Law*, 53-54 (1962); *Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 284-85, 345 F.2d 964, 974-75, *cert. denied*, 382 U.S. 894 (1965) (Opinion of Bazelon, C.J.).

Where the courts have reached this issue, the majority rule seems to be that the possession of narcotics is illegal regardless of the amount involved. *State* v. *Dodd*, 28 Wis.2d 243, 137 N.W.2d 465 (1965). There, heroin traces were found on tinfoil packets in a refuse container and in an eye dropper in close proximity to appellant. The view was accepted that possession of a modicum or discernable amount as detected by scientific tests was within the prohibition of the applicable statute whether the amount was usable or not, because the statute did not prescribe any minimum amount which must exist. To the same effect is *State* v. *Jefferson*, 391 S.W.2d 885 (Mo. App. Div. 1967) (no effort to determine quantity of narcotics; *held*, prosecution need not prove quantity was sufficient to create a narcotic effect, since possession of any amount is within the prohibition of the statute); *State* v. *Winter*, 16 Utah 2d 139, 396 P.2d 872 (1964) (not error to refuse instruction that amount of narcotic must

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[15] Narcotic Control Act of 1956, 70 Stat. 572 (1956), 18 U.S.C. § 1402 (1964); see H.R. Rep. No. 2388, 84th Cong., 2d Sess. 53 (1956); S. Rep. No. 1997, 84th Cong. 2d Sess. 5, 7, 13-14, 21 (1956); President's Commission on Law Enforcement and Administration of Criminal Justice, *Task Force Report on Narcotics and Drug Abuse* 3 (1967).

be usable, since test is possession, not usability);[16] *State* v. *McDonald*, 92 N.J. Super 448, 224 A.2d 18 (1966) (assertion that State failed to show a sufficient quantity rejected; prosecution need not carry burden of showing by quantitative analysis the amount of heroin in a drug proscribed by statute); *Mickens* v. *People*, 148 Colo. 237, 365 P.2d 679 (1961) (argument that particles of cannabis found in appellant's pockets too minute to be of use and therefore not a narcotic within meaning of statute rejected); *Duram* v. *People*, 145 Colo. 563, 360 P.2d 132 (1961) (statute denounces possession of any amount of narcotics); *Schenher* v. *State*, 38 Ala. App. 573, 90 So.2d 234 (1956) (quantity of narcotic drug possessed immaterial under statute). *Peachie* v. *State*, 203 Md. 239, 100 A.2d 1 (1953); (quantity of narcotics possessed not material); see also *State* v. *Johnson*, 112 Ohio App. 124, 165 N.E.2d 814 (1960) (showing of traces of narcotics sufficient by implication). *Cf. Blaylock* v. *State, supra; People* v. *Norman*, 24 Ill.2d 403, 182 N.E.2d 188, *cert. denied*, 371 U.S. 849 (1962) (no testimony as to quantity of narcotics involved; not necessary for prosecution to establish same in the first instance). We suggest, moreover, that appellant's contentions were rejected by implication in *Briscoe* v. *United States*, 119 U.S. App. D.C. 41, 336 F.2d 960 (1964). Had appellant there been convicted for possession of a quantity of narcotics such that no offense cognizable under the statute had been committed, such a conviction could hardly have been deemed harmless error.

We find unpersuasive the authority to the contrary, creating as it does an exception to the applicable statutory language and negating the policy expressed in those statutes. Texas, California and Arizona are the only states which require that a small quantity of narcotics

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[16] The Court also noted, citing *Locke* v. *State*, 169 Tex. Cr. 361, 334 S.W.2d 292 (1960), that even in jurisdiction requiring that the amount be usable, this need not be shown where the appellant confessed that he had illegally imported the substance. 16 Utah at ——, 396 P.2d at 874-75.

be usable if a conviction for possession is to be sustained.[17]

The Texas Court originally took this position in *Greer* v. *State*, 163 Tex. Crim. 377, 292 S.W.2d 122 (1956). There, the testimony was that appellant had in her possession a small bottle cap in which there was a piece of cotton, tests of which indicated the presence of heroin residue. Without citing any authority, and without any other reasoning, the Court said it would not "construe the Uniform Narcotics Act as authorizing a conviction for possessing a small piece of wet cotton containing a trace of narcotic such as may have wiped from a needle following an injection". *Id.* at 377, 292 S.W.2d at 122. A year passed before this rule was justified in *Pelham* v. *State*, 164 Tex. Crim. 226, 298 S.W.2d 171 (1957). Some "dustings" were scraped from appellant's pockets and with the aid of a microscope, a chemist was able to find particles of marijuana, as to which he was unable to express any opinion as to amount or weight.[18] The Court noted that

> it was only by use of a microscope that the chemist was able to determine the presence of marijuana in the dustings which were scraped from appellant's pocket. It would be a harsh rule, indeed, that would charge appellant with knowingly possessing that which it required a microscope to identify. *Id.* at 227, 298 S.W.2d 173 (1967).

Marijuana, they reasoned, was usually smoked, not taken internally or by hypodermic. Therefore,

> the reasonable construction and interpretation . . . is that the legislature intended that to constitute the unlawful act of possessing marijuana there must be

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[17] In the District of Columbia, the *Edelin* decision was preceded by a memorandum decision by Judge Halleck granting a motion for judgment of acquittal in *United States* v. *Glover*, U.S. Cr. Nos. 9431-5 and 9432-5, D.C. Ct. Gen. Sess., January 24, 1966 (unpublished).

[18] The court, upon a "reasonable interpretation of the facts", characterized the amounts as "infinitesimal" *Ibid.*

possessed an amount sufficient to be applied to the use commonly made thereof. *Ibid.*

Appellee submits that this decision reflects a recognition that a process of cumulation, not achievable by appellant without microscopic or scientific aids, would be required before any use at all could be made of marijuana particles unintentionally mixed with other substances. And, implicit in the decision is a concern with the risk of erroneous conviction on the basis of the possible absence of *knowing* possession of a banned substance, the presence of which appellant could not even detect. Neither concern is applicable here. The substances recovered were already in a usable, visible, and indeed quite common form. Capsules and white powder containing heroin, we suggest, are a far cry from dustings and scrapings which may incidentally reveal the past presence of larger quantities of marijuana. And the circumstances of the sales were such that if they occurred, they were plainly volitional, conscious acts involving knowledgeable possession and transfer of substances expected to give a narcotic effect. See *Blaylock* v. *State*, *supra*.

In *People* v. *Leal*, 50 Cal. Rptr. 777, 413 P.2d 665 (1966) *(en banc)*, the California Supreme Court held that an inference of knowing possession could not be drawn from the mere possession of a minute crystalline residue of narcotic useless for either sale or consumption. 50 Cal. Rept. 782, 413 P.2d at 670. Appellee submits that the case turned in large measure on California's statutory scheme, which has been interpreted to require a peculiar standard of knowing possession not present under federal statutes. Moreover, none of the cases reversing a narcotics conviction and cited in *Leal* involved situations in which other than traces or narcotics in altered form were found on implements usually used by addicts. Appellee suggests that the Court's concern with the possibility of an erroneous conviction based on such substances was at least in part being voiced; that it, the primary concerns were not the percentage *per se* of nar-

cotics present in a given substance or usability, but whether knowledge could be attributed to an appellant shown to possess only "dirty" implements or narcotics residue in changed form. See, *e.g. People* v. *McCarthy*, 50 Cal. Rptr. 783, 413 P.2d 783 (1966); *People* v. *Anguilar*, 223 Cal. App. 2d 119, 35 Cal. Rptr. 516 (1963).

In *State* v. *Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962) *(en banc)*, the Supreme Court of Arizona affirmed a conviction for possession, holding that the amount of a narcotic possessed, though so small as to require chemical analysis to detect its presence, is sufficient if the quantity is such as to be usable as a narcotic under known practices of addicts. Like the California decisions on which it is based in part, the Court had before it substances essentially incidental to the use of narcotics—residue found on four wads of cotton. That the California cases expressed their unique concern with the knowledge requirement was blithely ignored by the court. Testimony that such wads were collected and saved for booster shots was viewed as satisfying the usability requirement, apparently imported from Texas law. Again we suggest that the form of the substances here involved obviated such a requirement. Moreover, the Arizona Court ignored the fact that the Texas rule reflected that jurisdiction's desire to alleviate the harshness of imposing criminal sanctions for the possession of undetectable quantities.[19]

Since then, the Arizona Court has had occasion to reconsider its rule under circumstances similar to those presented here. In *State* v. *Ballesteros*, 100 Ariz. 262,

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[19] A number of other faults inhere in the Arizona rule. First, it would add an additional element to the government's proof which is not inferable from the statutory language. Second, it gives no consideration to the fact that usable quantities under known practices of narcotics addicts may vary according to the tolerance of the particular addict involved. Third, no indication is given as to how substantial or well qualified the testimony regarding utility must be. See *State* v. *Cota*, 99 Ariz. 237, 408 P.2d 27 (1965) (testimony of ordinary police officer apparently enough). In view of these problems, such a rule, if desirable at all, should be instituted only by legislative action, after careful consideration and investigation.

413 P.2d 739 (1966), appellant claimed that his conviction should be overturned because the prosecution failed to establish that the amount of heroin contained in two small packages sold by him to narcotics agents was usable under known practices of narcotics users, relying on *Moreno*. The court rejected this contention, distinguishing sale and possession situations:

> The charge of possession . . . requires a union of act and intent . . . As a matter of law, the intent necessary to establish the crime of possession is not present when the amount is too minute to be applied to any use, even though it might be identified as narcotics by chemical analysis. But where the crime charged is the sale of a narcotic drug, the required intent is established by the transfer of any amount when the accompanying circumstances indicate an intent to sell. at 413 P.2d at 741 (emphasis supplied).

This decision was followed in *State* v. *Cortez*, 101 Ariz. 214, 418 P.2d 370 (1966); see also *State* v. *Epinosa*, 101 Ariz. 474, 421 P.2d 322 (1966). Thus, not only is *Moreno* unpersuasive as applied to these facts, other authority in the same jurisdiction supports appellee's position with respect to appellant's sale of narcotics.

Of course, appellant's admission that he possessed heroin should obviate the necessity for considering appellant's contentions as to the other counts. But should the Court consider these contentions, for the reasons stated above appellee submits that they should be rejected.

VI. Appellant has not discharged his burden of showing that he received ineffective assistance of counsel.

(Tr. 4, 5, 15, 33, 40-48, 98, 159-172, 174-178, 180-182, 193-194).

Appellant attacks the assistance trial counsel, now deceased, rendered during the course of the proceedings below. Appellee submits appellant's claims in this regard must go unrequited.

Earlier cases held that a claim based on incompetence of counsel cannot prevail unless the trial had been rendered a mockery and a farce. More recently, this Court has pointed out that "[t]hese words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness". *Bruce* v. *United States*, —— U.S. App. D.C. ——, ——, 379 F.2d 113, 116 (1967); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958). While no one error or oversight might indicate ineffective assistance of counsel, cumulatively they may when the case is a close one. *Dyer* v. *United States*, —— U.S. App. D.C. ——, 379 F.2d 89 (1967). Appellee submits that this case was not close at all. The evidence of appellant's guilt not only reached overwhelming proportions (assuming the jury believed the prosecution's witnesses on identification, which they apparently did), but with respect to the possession of heroin on the date of his arrest, appellant in effect pled guilty (Tr. 177, 181-82). Accused persons are not guaranteed counsel who do not make mistakes, nor are they guaranteed successful assistance. *Dayton* v. *United States*, 115 U.S. App. D.C. 341, 319 F.2d, *cert. denied*, 375 U.S. 947 (1963); *Moore* v. *United States*, 95 U.S. App. D.C. 92, 220 F.2d 198 (1955). A review of the record negates appellant's claim.

Appellant's counsel on appeal, insulated from the heat of the trial combat, has assiduously pointed out things trial counsel did not do, but has neglected to mention all that he did do, despite the weakness of appellant's case. The record disclosed that counsel exercised his perogative to excuse jurors (Tr. 15), thoroughly cross-examined Agent Mordecai, the government's principle witness, as to the undercover activities, the circumstances of the arrest and the sales, how he kept notes of the transactions;[20] and sought and obtained the identity of the informant

[20] Counsel sought and obtained the agent's notes (Tr. 98).

(Tr. 40-48).[21] He studiously cross-examined the chemist as to his analysis of the substances allegedly recovered from appellant on each and every occasion, seeking and succeeding in bringing out the facts that small quantities were involved and that there had been no quantitative analysis of any of the substances (Tr. 159-164). He cross-examined the chemist on the meaning of "traces" and showed that the chemist was an Internal Revenue Agent and employee (Tr. 165-169). In fact, the cross-examination of the chemist consumed more than ten pages of transcript (Tr. 159-170). He then in effect moved for judgment of acquittal on the issue of the quantity of narcotics involved (Tr. 170-172).

At the appellant's insistence he moved to have the informant John Williams produced as a witness and elicited from appellant his claims that he was only a user, not a seller of narcotics (Tr. 174-178). He proffered the questions appellant wanted to ask Mr. John Williams (Tr. 193-194). On the whole, counsel conscientiously and diligently protected appellant's interests. In fact, initial appellant's dissatisfaction with his attorney's services stemmed from their disagreement as to how he should plead (Tr. 4, 5).[22] Though appellant took the stand, neither then or at any other time did he indicate that he was not satisfied with the services rendered.

We cannot believe that under the circumstances of the case counsel was remiss in not moving to suppress or to sever the counts (Tr. 33). What relevant statements, fingerprints, photographs, names and addresses of witnesses or police and federal-investigative agency reports

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[21] The docket disclosed that counsel also moved to subpoena the wife of the informant on January 23, 1967, which motion was granted.

[22] Counsel had advised appellant to plead guilty (Tr. 4, 5). Given the way the government's facts developed at trial, it was not hard to understand why. Moreover, as the trial judge pointed out, it was his "understanding that if there were a plea of guilty to one of the counts, the Government would consider dismissing the other counts . . ." (Tr. 5).

would, made the subject of discovery, have aided appellant's cause? Exculpatory information, if available, would have come from appellant himself. Moreover, the record showed that appellant was on bond prior to trial and so not only could have seen and conferred with his attorney at will, but provided him with exculpatory information, if any were available (Tr. 180).

Reduced to its barest minimums, appellate counsel's argument is that had he been given the opportunity to conduct the trial, things would have been done differently. It may be that appellant would have fared better had his trial counsel been more knowledgeable or aggressive, but that is not the test.

We submit that viewing the record as a whole and given the strength of the government's case, there is no doubt that appellant received the minimum standards of competence of counsel such as would satisfy constitutional requirements. Appellant has failed to meet his heavy burden of showing the requisite unfairness.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,973

ROBERT L. JONES,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES COURT OF APPEALS
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ROBERT L. JONES,

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REPLY BRIEF FOR APPELLANT

There are some major flaws in the Brief of Appellee as to certain issues raised in this appeal. This reply brief will try to clarify these matters so that the operative facts can be seen in their true perspective.

At the outset, we must stress the vital difference of punishment provided in the several statutes involved in this case. If appellant was guilty only of possessing narcotics as alleged in Count 7 of the indictment in violation of 26 U.S.C. Section 4704(a), he would be entitled to both probation and parole. Under 26 U.S.C.

Section 4705(a) and 21 U.S.C. Section 174, however, his minimum sentence would be five years without probation or parole. Appellee's argument on pages 13 and 19 of its brief is therefore unsound insofar as it seeks to validate all sentences merely because they are concurrent.

The appellee is in error when it states (a) that the appellant in effect admitted his guilt as to the two narcotics counts arising out of his possession, on the day of his arrest, of capsules he knew contained heroin and (b) that his testimony proved his guilt as to the eighth count charging facilitation of transportation, concealment, or sale with knowledge of importation (Appellee's brief pages 10, 13, 21). Appellant did possess capsules when he was arrested. Some contained heroin. Others did not. His explanation of his possession was clear, plausible and uncontradicted. In view of the record, we must conclude that there is at least a reasonable doubt that appellant did facilitate and did know, as 21 U.S.C. Section 174 provides and as the indictment alleges. It follows that if appellant did violate the narcotics laws, then he did so only on June 28, 1966 and in terms only of possession, not sale or facilitation. He is accordingly entitled to the benefits of probation and parole and hence his seven concurrent sentences, five of which are five-year, non-probation, non-parole terms, are invalid.

Appellee cites several cases on pages 13-15 of its brief in support of its contention that the delay

between offense and arrest did not deny appellant due process of law. The problem is aptly expressed by Judge Washington in Cannady v. United States, 122 U.S. App. D.C. 120, 351 F.2d 817 (1965) where at page 121 he said:

> It must be recognized that the delay between an alleged offense and the arrest of an accused, when he is first informed of the accusations, may so blur his memory that were he innocent he might be unable to recall the facts which would comprise his alibi or other defense. It is also to be recognized that the risk of an erroneous conviction under these circumstances is compounded when the government's case consists solely of the uncorroborated testimony of a narcotics agent.

In the light of this cogent commentary, an analysis of the cases cited by appellee on pages 13 and 14 of its brief shows either that these cases are clearly distinguishable from that of appellant or that in principle they support him. In Worthy (page 13) great plausibility was given to the undercover agent's identification by reason of his many opportunities to observe the defendant. There was absence of such evidence in the instant case. Agent Mordecai testified only that before the first alleged sale he did not know appellant but had previously seen him in the area. According to the record, his observation may have been only an isolated event on a day far removed in time. For this reason Bey (page 13) does not control the instant appeal. In Bey there were four closely-spaced narcotics transactions. Each involved a lengthy confrontation between the undercover agent and the defendant. There was

no such face-to-face interaction between Agent Mordecai and appellant. In Morrison (page 14) the agent had seen and recognized the defendant on numerous occasions. Such basis for identification is absent in our appeal. In Bey the agent was able to remember the facts independently. In our case Mordecai was in error as to the date of the second alleged offense and had to resort to his records. In Worthy, Powell, and Daniels (pages 13 and 14) the undercover agent was corroborated by another witness. In our case Mordecai was the only witness to the two alleged sales. These appellant Jones denied. In Roy (page 14) the Government made diligent efforts to locate the defendant, resorting to surveillance, interviews and neighborhood trips. The record is silent as to why Jones' arrest occurred almost three months after the second alleged offense. In Mackey, Roy, and King (pages 13 and 14) the delay between the offense, arrest and trial was in each case due entirely or chiefly to defendant's motions for continuances. Such motions did not cause the delay of one year from appellant's first alleged sale to his trial. In Roy the defendant called an alibi witness. Appellant could not do likewise, since he could not remember what he did on February 7, 1966, one year before his trial. Hence, except for the date of his arrest, he could not, as did the defendant in Cannady, testify in considerable detail about the circumstances surrounding the two alleged

offenses one year and ten months, respectively, prior to the trial. In Powell (page 14) the defendant refrained from testifying despite the fact that the buyer, who bought the narcotics in the presence of the undercover agent, testified and corroborated the agent. In Powell the defendant did not prove any basic unfairness or prejudice from delay. He merely failed to prove his alibi defense.

Appellant Jones' case is within the purview of Godfrey (cited at page 14 of appellee's brief.) In Godfrey two of three sales occurred on October 11 and 12, 1962. The undercover agent signed a complaint on December 5, 1962 but due to lack of diligent efforts by the police, defendant was not arrested until February 11, 1963. He testified he could not remember what he did on the two days in question. The trial court held that the combined delays prejudiced his defense of these charges. The judge accordingly dismissed them. This Court affirmed the trial judge's ruling that the delay between the offenses and the arrest was unreasonable. We have here (a) a delay between appellant's alleged sale on February 7, 1966 and his arrest on June 28, 1966, and this sale, (b) his trial one year after the sale, (c) a flimsy uncorroborated identification of appellant as a seller, (d) appellant's inability to remember what he did a year before the trial, and (e) the unavailability of the alleged informer's testimony. We submit that appellant's case is within Ross, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965) and that the special

circumstances in the case point to a questionable uncorroborated identification of appellant and prejudice to his defense stemming from his failure to recall and the alleged informer's inability to remember and refusal to testify as to the details of the alleged sale on February 7, 1966.

On the issue of entrapment appellee admits that an inducement or instigation to commit a crime may be a valid defense. (Appellee's brief page 22) Appellant submits that if he did make the alleged April 6, 1966 sale, the facts, set forth on page 3 of appellee's brief, may indeed present a substantial question of fact. The agent testified that he told appellant to enter his car and that he bought narcotics from appellant. Hence it was for the jury to have determined whether this conduct of the undercover agent amounted to an inducement or instigation.

Appellee's discussion of the so-called "traces" issue merits a few comments. The first line of the first full paragraph on page 27 of appellee's brief contains an inadvertent error. The word " quantitative" should be "qualitative." The chemist did not make a quantitative analysis and did not know how much heroin hydrochloride each mixture contained. He testified that each mixture contained a "very minute amount of material." Congress was more concerned with narcotics pedlars than it was with narcotics addicts. See opinion of Bazelon, C. J. in Hutcherson v. United States, 120 U. S. App. D. C. 274, 345 F.2d 964. (1965) We can therefore argue that Congress did not intend equal

punishment for an addict who buys the very minute amount of $\frac{1}{100}$ of an ounce of heroin and a pedlar who sells five ounces. The quantitative-sufficiency test thus presents a serious substantial question of public policy. This Court must determine (a) whether Congress intended that the law-enforcement agencies and the courts should deal with trifles or (b) whether the narcotics statutes were drafted in terms of reaching any quantity of the substances specified therein.

In our view, appellee has not met our argument pointing to possible lack of adequate effective assistance of counsel. For an example, we request the Court to read the closing jury argument of appellant's counsel in the trial court. It is found on pages 202-205. In essence, it is devoid of any discussion which could afford an inference of mistaken identity. Moreover, counsel was not warranted in conceding that his client had committed the offense charged in Count 8. There is no evidence that appellant knew of the illegal importation of the heroin found in his possession when he was arrested. If his testimony is true, he had bought this drug between thirty and forty-five minutes before the arrest. Under these circumstances and on the entire record knowledge of illegal importation should not be imputed to appellant. Counsel's concession was therefore unjustified and prejudicial. United States v. Peeples, 377 F.2d 205 (2 Cir. April 18, 1967)

CONCLUSION

For the reasons stated in appellant's main brief and in this Reply Brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,973

ROBERT L. JONES, Appellant

v.

UNITED STATES OF AMERICA Appellee

PETITION FOR REHEARING EN BANC

I. PRELIMINARY STATEMENT

Appellant respectfully petitions the Court for a rehearing en banc of this appeal. The judgment of the panel (Senior Circuit Judge Edgerton and Circuit Judges Wright and Tamm) was entered on November 20, 1967 without an opinion.

The basic reason for granting this petition is that this appeal presents two vital issues of law, which to date are unresolved by this Court and involve commonly-recurring factual situations in narcotics prosecutions. The per curiam, no-opinion disposition of this appeal creates a serious conflict with decisions of (a) the Court of General Sessions and (b) the Court of Appeals of the District of Columbia as well as those of several states on the important question of lack of proof of quantitative sufficiency of a substance for use as a narcotic. Moreover, the Court by its

silence appears to approve a trial court's sua sponte granting to an informer the privilege against self-incrimination when there is neither any basis for nor any claiming of such privilege. Unless reviewed by the full Court, the present judgment, without opinion, will tend to create doubt or confusion as to (a) the validity of the "quantitative sufficiency" test recognized and applied in lower courts in the District of Columbia and (b) the right of a defendant to use the testimony of an informer to prove certain defenses such as mistaken identity, entrapment and alibi

A brief review of the relevant facts is stated below for the convenience of those members of the Court who were not members of the panel.

II. STATEMENT OF FACTS

The Government introduced evidence to prove that appellant sold a mixture of substances, including heroin, to an undercover agent on February 7, 1966 in the presence of an informer;that on April 6, 1966 appellant sold to the same agent, in the presence of a second informer, a mixture of substances, also including heroin; and that when he was arrested on June 28, 1966 appellant possessed a mixture of substances, including heroin. Appelant denied that he ever sold heroin but admitted possession of the narcotic drug on June 28, 1966.

The Government chemist who analyzed the three mixtures in evidence testified that the mixture involved in the alleged February 7, 1966 sale weighed 500 milligrams and contained

heroin hydrochloride, quinine hydrochloride, and mannitol. He said that the mixture involved in the alleged April 6, 1966 sale weighed 320 milligrams and contained heroin hydrochloride, quinine hydrochloride, and mannitol. The chemist also said that the mixture involved in the June 28, 1966 possession weighed 240 milligrams and contained heroin hydrochloride, mannitol and milk sugar. Of these substances, only heroin hydrochloride is a narcotic drug and a derivative of opium.

The chemist testified that his analysis was only qualitative and not quantitative, that he did not determine the amount of any of the four above-mentioned ingredients, that he did not try to ascertain what percentage of the contents of these substances was heroin hydrochloride and the three other chemicals, respectively, and that he did not ascertain the amount of heroin hydrochloride.

The record is completely devoid of evidence as to how much heroin a substance must have to be susceptible of use as a narcotic. The Government's chemist testified that 320 milligrams is a "very minute amount of material," and he said in effect that a milligram is 1/28375 of an ounce.

During the trial appellant produced the informer involved in the first alleged sale and sought his testimony as to the details of this transaction. The informer did not state any facts relating to the privilege against self-incrimination and did not claim the privilege. Despite a total absence in the record of anything which might show

how and to what extent the informer could have incriminated himself, the trial judge, sua sponte, excused him from testifying. The entire colloquy involving this episode is contained on pages 189-196 of the transcript and is reproduced in full as Appendix B of appellant's main brief.

Other aspects of the record relate to (a) the delay of four and one-half months from the date of the first sale to the arrest and one year from the sale to the trial, (b) the trial judge's refusal to instruct on entrapment, and (c) the kind of assistance appellant received from his counsel. We do not urge these matters as the basis for this petition for rehearing.

III. ARGUMENT

A.

The narcotics conviction of appellant was based only on a qualitative analysis of the substances received in evidence. Accordingly there was no proof of quantitative sufficiency of its usability as a narcotic. This situation presents the important question as to legislative policy. It has therefore been the subject of several judicial opinions, including those of the District of Columbia Court of Appeals and Court of General Sessions, cited in our main brief in our favor. In Briscoe v. United States, also cited there, appellant contended that there was an insufficient amount of material to permit of quantitative chemical analysis and thus there was failure of adequate proof of the exact amount of heroin sold

by appellant. In its per curiam opinion this Court refrained from deciding the issue because it had not been properly raised at the trial.

This issue was specifically raised in appellant Jones' trial and in the instant appeal. It consumed much space in the briefs and time in the oral argument and was the subject of serious probing questions by all three judges of the panel. We refrain from repeating what we said in our main brief and reply brief and instead urge the members of this Court who did not comprise the panel to read our briefs for a discussion of this issue. We submit that the legal profession of the District of Columbia, including the judges of the Court of General Sessions and Court of Appeals of the District, has both a right and a duty to know whether the Edelin and Marshall decisions are still valid in the District or whether this Court in the instant appeal has sub silentio rejected the doctrine that "where there is only a trace of a substance, a chemical constituent not quantitatively determined because of minuteness, and there is no additional proof of its usability as a narcotic, there can be no conviction..." Edelin v. United States, 229 A. 2d 449 (D.C. App., 1967)

B.

Appellant raised the issue whether the trial judge commits reversible error when, on his own motion, without any interrogation by court or counsel, he excuses, sua sponte,

an informant who is called and sworn as a witness for the defendant but who does not claim a privilege against self-incrimination and does not inform the judge of any fact in his prospective testimony which could or might implicate him and create the danger of his conviction for crime, and who could not on the record validly claim the privilege against self-incrimination. This Court's no-opinion, per curiam judgment creates an ambiguity of inference on this matter. Counsel respectfully submits that this issue is of such great importance and frequently-recurring probability that the full Court should rehear this appeal.

The trial judge's invoking, sua sponte, the privilege which was not asserted and could not be claimed by the informant, in view of the noncriminality of his acts, prejudiced appellant. Being thus foreclosed by the court, appellant could not develop through the informant's evidence relating to matters of identity, entrapment and other possible aspects of the alleged sale on February 7, 1966. The Supreme Court, in Roviaro v. United States, 353 U.S. 53 (1957) and McCray v. Illinois, 386 U.S. 300 (1967) discussed the value and need of an informant's testimony in proving issues of identity and entrapment. We cannot and should not speculate on the outcome of the trial and the fate of appellant's liberty if the informant had testified and had contradicted the prosecution's only witness as to the alleged sale. The full Court should therefore review this question. By this means the possible uncertainty or confusion of the present decision may be avoided.

IV. CONCLUSION

Accordingly, appellant respectfully prays that the Court rehear this appeal en banc.

Respectfully submitted,

Milton A. Kallis

CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

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(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition has been mailed to attorney for appellee, David G. Bress, Esq., U. S. Attorney, U. S. Courthouse, Washington, D.C. this day of December, 1967.

MILTON A. KALLIS
Attorney for Appellant
(Appointed by this Court)

December , 1967